

FINAL EXAM
CAPITAL UNIVERSITY LAW SCHOOL
PROPERTY II-B
SPRING 2002
Professor Dennis Hirsch

Professor's Instructions: *Read Carefully*

1. At the beginning of this exam, you should have the following:
 - a. This 13-page exam packet.
 - b. A scantron form sheet for the multiple choice questions and a scantron instruction sheet.
 - c. A #2 pencil to mark the scantron sheet, and a pen for writing the narrative portion of the exam.
 - d. Answer books.
2. ***Please write your exam number on the front of your envelope, the upper right hand corner of your exam packet and on each of your answer books.***
3. ***Please fill in the identifying information on your scantron form, as indicated in the instructions on the front of the form.***
4. This is a two hour and fifteen minute examination (2:15). It consists of a multiple choice section, and an essay. I recommend that you spend 60 minutes on the multiple choice questions, and 75 minutes on the essay. In grading the exam, I will allocate points roughly in proportion to these recommended time allocations. Manage your time wisely. Make sure that you reserve enough time to answer all parts of the exam fully.
5. The multiple choice questions are to be answered only on the multiple choice scantron answer sheet (this goes even for those taking the exam on computer). Mark your answers on the scantron form by filling in the space for the letter that corresponds to the best answer for each question. If you erase, do so thoroughly. Otherwise the computer may grade your response incorrectly. Answers written on the exam packet itself will not be considered.
6. Write the answers to the essay in the colored answer books (unless you are taking this exam on a computer). If you write more than one answer book, number the books sequentially (e.g. Essay, book 1; Essay, book 2, etc.) Answers written on the exam packet itself will not be considered.

7. *At the conclusion of the exam, please insert your exam packet, answer books, and scantron sheet into the envelope. Then place the envelope in the box at the front of the examination room. **You may not make a copy of or otherwise reproduce the exam packet.***

GOOD LUCK!

MULTIPLE CHOICE
(60 minutes)

Instructions: In answering these multiple choice questions you should select *the best* answer from among those provided. You should also assume that all the cases that we read this semester apply in the jurisdiction where the question is situated.

Question 1: Abner owned Blackacre in fee simple and lived on the property. One day, Abner decided to make some improvements to his home. Lacking the necessary funds to do so, he took out a home improvement loan from the Small Town Bank and secured it with a mortgage on Blackacre. This mortgage interest was not recorded. Some years later, Abner conveyed Blackacre to Brenda in fee simple by general warranty deed. This deed, which was recorded, failed to mention Small Town Bank's mortgage interest in the property and Brenda had no knowledge of this title defect. Brenda soon wanted a larger home. She accordingly sold Blackacre to Charlie in fee simple by special warranty deed that was promptly recorded. This deed, too, failed to mention the Small Town Bank mortgage interest since Brenda did not know of it. Several years later, Charlie decided to sell Blackacre to Diana. Diana had a friend who worked at Small Town Bank and, in casual conversation, happened to mention to him that she was interested in purchasing Blackacre. Her friend informed her of Small Town Bank's mortgage interest in the property. When Diana brought this to Charlie's attention he had to reduce the purchase price by \$25,000 (the amount still remaining to be paid to Small Town Bank). Charlie has now sued Brenda for violation of the covenants in her deed to him. He seeks damages of \$25,000. The most likely resolution of this lawsuit will be that:

- (A) Charlie will win because he did not receive from Brenda the full property interest that he thought he was purchasing.
- (B) Charlie will win because Brenda breached the warranties in her deed to Charlie.
- (C) Brenda will win because she conveyed the property to Charlie by special warranty deed, not general warranty deed.
- (D) Brenda will win because she made no affirmative misrepresentations to Charlie.

Question 2: In 1995, Polly Purchaser bought a single-family home on a half-acre of land for \$150,000. Since Polly only had \$15,000 available as a downpayment, she took out a 30-year mortgage loan from Bankers & Co. for the remaining \$135,000. Polly made all payments due to Bankers & Co. under the Note until January, 2001, when she lost her job and defaulted on the loan. Shortly thereafter, Bankers & Co. foreclosed on the property and held a lawful foreclosure sale at which the property sold for \$175,000. Assume that, at the time of the foreclosure sale, Polly still owed Bankers & Co. \$115,000 in debt principal and had not taken out any other loans secured by the home. The amount of the proceeds from the foreclosure sale payable to Polly should be:

- (A) \$60,000
- (B) \$45,000
- (C) \$40,000
- (D) \$15,000
- (E) \$ 0

Question 3: On **May 1, 1998**, Olivia Owner conveyed Greenacre, a parcel of open fields, to Diane Developer for \$15,000. Diane neither recorded the deed nor entered into possession of Greenacre. A few weeks later, Fred Farmer happened to be passing by Greenacre and saw that it was unoccupied. Believing that Olivia still owned the land, he approached her about purchasing it. Without telling Fred that she had already sold the land to Diane, Olivia conveyed Greenacre to Fred for \$12,000 on **June 1, 1998**. Fred did not record the deed, but he did enter into possession and began farming the land. On **September 1, 1998**, Diane saw that Fred was farming the land. She went down that day to the county recorder's office and recorded her deed from Olivia. On **October 1, 1998**, she went to see Fred and told him to get off her land. Fred insisted that it was *his* land and, just to be sure, went that day and recorded his deed from Olivia. Diane then brought a quiet title action against Fred asserting her claim to the Greenacre. *Assume that the suit is brought in a jurisdiction where the recording statute follows the "notice" rule for determining priority.* The most likely result of Diane's action is that:

- (A) Fred will win because his possession and farming of the land provided notice to Diane of his claim to it.
- (B) Fred will win because he knew nothing of Diane's purchase at the time he paid \$12,000 for Greenacre.
- (C) Diane will win because she was the first to provide record notice of her purchase.
- (D) Diane will win because she was the first to purchase the land from Olivia.

Question 4: For the purposes of this question, assume that the facts are the same as in Question 3 *up until and including the events of September 1, 1998 only.* Now assume that on **September 10, 1998**, Bob Buyer became interested in purchasing Fred's interest in Greenacre. He performed a title search and saw in the record Diane's deed from Olivia (which Diane had recorded on September 1). Undeterred, he went ahead with the deal and bought Fred's interest for \$13,000 on **September 20, 1998** and recorded his deed that day. On **October 1, 1998**, Diane, who had become aware of Bob's purchase from Fred, brought a quiet title action against Bob asserting her claim to Greenacre. *As in Question 3, assume that the suit is brought in a jurisdiction where the recording statute follows the "notice" rule for determining priority.* The most likely result of Diane's action is that:

- (A) Bob will win because Fred was in actual possession of the land at the time that he sold it to Bob.
- (B) Bob will win so long as this jurisdiction follows the “shelter rule.”
- (C) Diane will win because Bob had record notice of her claim at the time that he purchased Greenacre.
- (D) Diane will win because she purchased Greenacre before both Fred and Bob.

Question 5: Most zoning ordinances are a creation of:

- (A) The state legislature.
- (B) The chief executive officer of a locality (*e.g.* the mayor).
- (C) The local legislature (*e.g.* the city council).
- (D) The Governor of the state.
- (E) The local Board of Zoning Appeals.

Question 6: In 1910, Otto Owner conveyed to Loretta Lessee a 99-year lease in Redacre, an undeveloped tract of land that he owned in fee simple. The lease was duly recorded. Loretta had intended to develop the land for commercial purposes but the conditions never seemed right and so she never entered into physical possession of the property. In 1920, Otto conveyed his entire remaining interest in Redacre to Betty Buyer by deed that expressly mentioned his lease agreement with Loretta. In 1930, Betty conveyed her interest in Redacre to Polly Purchaser by deed that made no mention of Loretta’s lease. In 1945, Polly conveyed her interest in Redacre, which was still unoccupied and undeveloped, to Sam Speculator by deed that also did not mention Loretta’s lease. Sam held onto the vacant land for many years waiting for the right developer to come along and purchase it from him. In early 1988, Daisy Developer became interested in building a subdivision on Redacre and entered into a contract with Sam Speculator to buy it. Prior to closing, she conducted a title search and reviewed all recorded documents as far back as the 1920 deed from Otto Owner to Betty Buyer. Following the closing on May 1, 1988, Daisy commenced building a housing subdivision on the land.

In 1989, Loretta’s heirs (who inherited Loretta’s entire interest in Redacre) brought suit against Daisy asserting that they were entitled to possession of Redacre until 2009 under the 99-year lease from Otto to Loretta. The jurisdiction in which Redacre is located, and under whose laws the suit will be decided, has a “marketable title” statute with a “root of title” search period of 40 years. There are no adverse claims in the record other than Loretta’s (and her heirs’) claim under the 1910 lease, and Loretta’s heirs have never filed a “notice of claim” with respect to the leasehold interest. The most likely result of Loretta’s heirs’ suit against Daisy is that:

- (A) Daisy will win because she has a clear chain of title back to her “root of title” which is 1948.
- (B) Daisy will win because she has a clear chain of title back to her “root of title” which is the 1945 deed from Polly to Sam.
- (C) Daisy will win because she has a clear chain of title back to her “root of title,” which is the 1930 deed from Betty to Polly.
- (D) Loretta’s heirs will win because the 1920 deed from Otto Owner to Betty Buyer, which Daisy reviewed as part of her title search, should have put her on actual notice of Loretta’s leasehold interest.

Question 7: Whiteacre, an undeveloped parcel of land located in the State of Amazement (a fictitious state in the U.S.) had been in Oswald Owner’s family for generations and he owned it in fee simple. One day, when he was feeling especially sentimental, he decided to give Whiteacre to Francis Flame, an old girlfriend who lived out of state. He signed and dated a deed conveying his entire interest in Whiteacre to Francis and mailed her a copy. He then went down to the county courthouse and recorded the deed. Unfortunately, the letter to Francis got lost in transit and never reached her. Several years later, Oswald died. Francis came to the funeral and there learned for the first time about Oswald’s conveyance to her. She promptly brought a quiet title action against Oswald’s estate asserting her claim to the property. The estate (on behalf of Oswald’s heirs) resisted her claim. Based only on the facts above, the most likely result of this action will be that:

- (A) The estate will win because Oswald’s letter to Francis never reached her.
- (B) The estate will win because Francis did not learn of the conveyance until after Oswald’s death and it is not proper for a deed to function like a will.
- (C) The estate will win because Whiteacre had been in Oswald’s family for generations and it should remain in the family.
- (D) Francis will win because she asserted her claim to the land shortly after learning about Oswald’s conveyance to her.
- (E) Francis will win because Oswald recorded the deed and tried to mail it to her, thereby demonstrating his intent to give it to her.

Question 8: Omar Owner owned Blackacre in fee simple. In 1980, Omar conveyed Blackacre to Ivan Investor but reserved the mineral rights to himself (*i.e.* these were not included in the conveyance). This conveyance was duly recorded. In 1983, Ivan sold Blackacre to Chester Chump by general warranty deed that purported to convey the entire parcel, including the

mineral rights. Chester took possession and began living on the property. In 1995, Omar sold Blackacre's mineral rights (which he had retained) to Martha Miner. Several weeks later, Martha showed up at Blackacre with her digging equipment and began exploring for minerals. Chester, who lived on the property, was outraged. He tried to eject Martha from the property but found she had good title to the mineral rights. He therefore brought suit against Ivan for violation of the covenants in Ivan's general warranty deed to Chester. The jurisdiction has a 10-year statute of limitations for actions on deed covenants. Chester will have the best chance of success in his lawsuit if he asserts a violation of:

- (A) The covenant of quiet enjoyment.
- (B) The covenant against encumbrances.
- (C) The covenant of seizin.
- (D) The covenant of further assurances.
- (E) Chester will not succeed in suing under any of these covenants because the limitations period has run on all of them.

The following facts govern Questions 9 and 10: Stanley Seller owned a small home on a narrow, four-acre lot that ran alongside the Shady River. Stanley, who had just retired, wanted to move to Florida and so he put the property up for sale. Bernice Buyer saw the For Sale sign and immediately became interested in the property. She had been looking for a piece of land on which she and her two grown children (each of whom had their own family) could each have a home. She thought that Stanley's property might work for these purposes, since she could live in the existing home and her children could each build a home near the river on the four-acre parcel. On May 1, 2000, Stanley and Bernice signed a contract in which Bernice agreed to purchase Stanley's home and land for \$300,000. The contract stated that Bernice took the property "as is." The contract contained no express provision regarding marketability of title. The parties set a closing date of July 1, 2000.

Question 9: *For the purposes of this question only* assume that, in on June 15, 2000, Bernice thought to check the local zoning provisions and discovered, much to her surprise, an ordinance that banned all further construction of buildings within 2000 feet of the Shady River. Given the layout of the property, she realized that this ordinance would preclude the building of new homes for her children as she had planned. She immediately went to Stanley and asked to be released from their contract. Stanley refused, saying "a deal is a deal." The next day, Bernice brought suit against Stanley seeking rescission of their contract on the grounds that ban on further construction on the land rendered title "unmarketable." The most likely outcome of Bernice's suit against Stanley is that:

- (A) Bernice will win because the zoning ordinance is an encumbrance on the property that frustrates Bernice's legitimate expectations for development of the parcel.

- (B) Bernice will win because Stanley should have known about the zoning restriction and should have warned her about it prior to her signing the contract.
- (C) Stanley will win because the contract contained no guarantee that he would provide marketable title.
- (D) Stanley will win because the existence of a zoning ordinance restricting use of the property, without more, does not render title unmarketable.
- (E) Stanley will win because Bernice agreed to purchase the property “as is,” and the zoning restrictions were already in existence at the time that Bernice signed the contract.

Question 10: *For the purposes of this question only*, assume that on June 1, 2000, there was a torrential rainstorm and the basement of the home became flooded with six inches of water. Prior to this event, Stanley had no knowledge that the basement was subject to flooding as it had remained dry throughout his time in the house. After the storm, Bernice brought suit to rescind the contract on the grounds that Stanley should have disclosed to her the likelihood that the basement would flood during heavy rains. The most likely result is that:

- (A) Bernice will lose because she agreed to purchase the property “as is” and, in so doing, voluntarily assumed responsibility for existing defects such as the basement’s propensity to become flooded.
- (B) Bernice will lose because the contract did not expressly require Stanley to provide her with marketable title.
- (C) Bernice will lose because, at the time the contract was signed, Stanley had no knowledge that the basement was likely to become flooded.
- (D) Bernice will win because she now knows the home to be much less valuable than she originally believed it to be at the time she signed the contract.
- (E) Bernice will win because an “as is” clause does not eliminate a seller’s duty to disclose material defects that are not readily observable by the purchaser.

Question 11: The City of Expansion has decided that it needs to turn one of its two-lane roads into a six-lane highway in order to facilitate access to and from new residential neighborhoods springing up to the north of the City. Employing its power of eminent domain, the City has moved to condemn properties located within 50 feet of either side of the old, two-lane road (assume that this is necessary for the highway project). It has agreed to pay fair market value to the property owners whose land is being condemned. Harry Homesteader owns one of the

properties that has been condemned. His family settled this land more than a hundred years ago and he has a strong sentimental attachment to it. The farmhouse that his great-grandfather built stands about thirty feet from the old, two-lane road and will be destroyed as part of the highway project. Harry has brought suit under the Takings Clause of the U.S. Constitution to challenge the condemnation of his property. On which of the following claims is Harry likely to succeed in his suit:

- (A) The condemnation of his property constitutes a clear *regulatory* taking.
- (B) The condemnation of his property is not a taking for “public use.”
- (C) The City of Expansion has failed to offer him “just compensation” for the loss of his property.
- (D) Harry is unlikely to succeed with any of these claims.

Question 12: Tanya Twoface wanted to sell her farm. She told all her friends and put an advertisement in the local paper. Freddy First saw the ad and contacted Tanya. On February 1, 2002, Tanya sold the property to Freddy for \$45,000. Freddy did not record the deed. Since the growing season was coming up soon, Freddy quickly took possession and got to work plowing the fields and planting corn. He worked long hours and could often be seen out in his fields engaged in farming activities. On April 1, Steve Second passed by the farm, saw Freddy at work in the neatly plowed fields, and thought that the farm looked like a good piece of property. A friend had told him that Tanya was looking to sell the place. He did not know that she had already conveyed it to Freddy. He approached Tanya and offered her \$65,000 for the property. Tanya agreed, figuring that she could pay Freddy back his \$45,000 and still make money on the deal. Steve conducted a title search with respect to the property but did not see Tanya’s conveyance to Freddy since it had not been recorded. On May 1, 2002, Tanya sold the property to Steve for \$65,000. Steve recorded the deed the following day. Steve then sought to take possession but was rebuffed by Freddy who said that he, not Steve, was the owner of the property. Steve has now brought suit to establish his ownership of the farm. *Assume that the suit is brought in a jurisdiction where the recording statute follows the “notice” rule for determining priority.* What is the most likely outcome of Steve’s suit against Freddy:

- (A) Steve will win because he recorded his deed from Tanya, while Freddy did not.
- (B) Steve will win because Tanya is prepared to repay Freddy his \$45,000 purchase price.
- (C) Steve will win because, when he saw Freddy at work in the fields, he could have assumed that he was a day laborer hired by Tanya.
- (D) Freddy will win because Tanya’s offer to pay him \$45,000 does not make him whole.

- (E) Freddy will win because Steve had an obligation to look further into Freddy's possible ownership of the farm when he saw him at work in the fields.

ESSAY
(75 minutes)

Fanny owned a 10-acre corn farm in the township of Windy Valley, in the State of Whistle (a fictitious state). Windy Valley received its name from the nearly constant, strong winds that swept through the valley, bringing a chill on cold winter days and a refreshing breeze during the summer. Fanny lived in an old farmhouse that was located on the south-western portion of the property. Her farm was bordered on the north by Belt Hole Road, and on the east by Belt Buckle Road. These were the only roads that came near the farm. A single driveway ran from the farmhouse along the southern border of the property all the way out to Belt Buckle Road (*i.e.* running west to east) and Fanny used this as her way of getting on and off her property. The cables that brought electricity to the farmhouse also ran along the driveway and then hooked into the main cable that ran along Belt Buckle Road. All of the cables were buried underground so as to get them out of sight.

In the early 1980's, Fanny realized that Windy Valley, a corn and soybean farming area, was becoming home to more and more commuters from Breezy City which was only 20 miles away. Following the example of several of her neighbors, she decided to divide her property into two, equal halves, one comprising the western portion and one the eastern. She continued to live on the western portion. On the eastern half, she built for sale a new, luxury house, equipped with all the modern conveniences. The new house used the existing driveway and got its electricity from the existing cable that ran from the farmhouse out to Belt Buckle Road. In 1985, she sold the newly constructed home and the eastern 5 acres of her property to Aaron, a business executive who worked in Breezy City. Aaron loved the rural setting of his new home and liked to sit on the porch at night or in the back yard on weekends and listen to the wind in the leaves or the singing of the birds. Since Aaron now owned the eastern portion of the property, part of the driveway now rested on his land. He erected a gate at the end of the driveway where it met the Belt Buckle Road. However, he kept the gate open and never objected when Fanny used the driveway. The deed from Fanny to Aaron made no mention of her continued right to use the driveway or electrical cables that now crossed from her property, to Aaron's, and out to the public road, and the two never discussed this matter.

In 1990, Fanny decided to move to Florida and sold her interest in the remaining land (*i.e.* the western portion of the original farm, including the old farmhouse) to Betty, a computer programmer who worked in Breezy City. Betty and Aaron got along well and Betty continued to use the driveway, with no objection from Aaron who continued to leave the gate open. The two neighbors shared an appreciation for the peacefulness of their rural/residential area and enjoyed taking walks together outdoors. One day, they got to talking about how awful it would be if industrial or commercial businesses, with their noise and pollution, were to move into Windy Valley, and how the existing zoning regulations did not prohibit this. "Not going to happen on my property," Aaron announced. "Nor mine," Betty chimed in. The two neighbors decided to formalize this agreement and signed a document in which each "promised" on behalf

of themselves and their “heirs and assigns” to restrict their property to residential use only. The next day, they took the document down to the county courthouse and recorded it.

In 1995, Aaron’s company moved him to its Texas office. He sold his interest in the Windy Valley home and property to Carlos, one of his colleagues from work. Aaron had convinced Carlos of the peaceful pleasures of life in the country and had assured him that, pursuant to a written agreement, Betty’s property would never be used for commercial or industrial purposes. Carlos soon began to enjoy the qualities of his new home. He got along well with Betty and kept the gate open so that she could use the driveway that crossed his property.

In 2000, Betty left Windy Valley for a better opportunity and sold her interest in the property and old farmhouse to Diana, an entrepreneur. During the course of the sale Betty forgot to mention to Diana the agreement restricting the property to residential use only. Shortly after moving in, Diana began to construct on the property a 150-foot high, energy-generating windmill with 50-foot fiberglass blades. She used the driveway to bring in the parts and equipment necessary to build the windmill. Diana believed that windmills such as this, which generated electricity without any air pollution, were the way of the future and would help society to meet its energy needs without harming the environment. She invested \$1 million in the windmill. She planned to sell the electricity that it generated to the township and to transfer it by way of the existing electrical cables that ran from her property, across Carlos’s, and out to the main cable (assume that this is technically possible). When Carlos saw the windmill going up, he approached Diana and objected to what was going on. He told her how much he still valued the peacefulness of the area, and mentioned the agreement limiting the properties to residential use only. “That agreement was just between Aaron and Betty,” Diana replied, “it doesn’t apply to me.”

Recently, the power-generating windmill began operation. Its blades turned whenever the wind was blowing, which was almost all the time in Windy Valley. Carlos hated it. The huge structure greatly interfered with his view of the landscape, especially when he looked West to see the sunset. Even worse, the whirring of the blades was extremely loud, almost like a jet engine. Carlos found he could no longer enjoy being outside and could hardly carry on a conversation inside his house if the windows were open. He went to visit Diana and asked whether there was any way to make the windmill quieter. Diana replied that no one had yet invented a quieter, power-generating windmill. “Sorry, Carlos,” she said, “but you are just going to have to put up with it. It’s my property, after all, and I can do whatever I want on it.” “Oh yeah,” Carlos replied, “well two can play that game. The driveway and electrical cables run over my property and I am going to prevent you from using the portion of them that is located on my land.”

Carlos has come to you for legal advice. He wants to know what his legal options are in his dispute with Diana. In particular, he wants to know: (1) whether he can successfully enforce the written agreement, originally signed by Aaron and Betty, that limits the properties to residential use only, and get either damages or an injunction; (2) whether he can successfully bring suit to prevent Diana from using that portion of the driveway and/or electrical cables that cross his land; and (3) whether there are any other legal claims that he might assert in court against

Diana in order to prevent and/or get damages for her operation of the windmill. Write Carlos a memo in which you answer his questions and recommend a legal course for him to pursue.