PROPERTY

PROFESSOR KLERMAN FALL 2018

DECEMBER 11, 2018

OPEN BOOK

8 HOUR TAKE-HOME

This exam has 8 pages. Please make sure you have all eight.

This exam is open-book. You may consult any materials you wish. You may use a calculator.

You may not discuss the exam or any aspect of property law with anyone during the eight hours scheduled for this exam.

Your exam must total 5000 words or fewer. I hope it will be shorter. Indicate the word count in the top left-hand corner of your exam answer. Those who fail to provide an accurate word count will lose one point.

If you can, please upload your exam as a PDF file. Failure to upload your exam as a PDF file will NOT affect your grade.

Single space your answers. Do not use abbreviations for party names or any other words.

This exam was designed to be answered using only materials assigned for or discussed in class. Legal research is not forbidden, but it is not necessary, encouraged, or advisable. Neither discussion of nor citation to materials not covered in class will be rewarded.

This take home exam consists of a single essay question, with four specific disputes. For each dispute, you should identify important issues, make reasonable arguments on either side of any open question of fact or law, and state clearly how resolution of these issues will affect the outcome. Reasonable arguments are those that might be made in a trial court.

Good luck.

Papa Rump owns an apartment building with four units in Lake Tahoe (a city located in the mountains near the California-Nevada border). In December, Papa died, leaving the building:

 “To my son Donnie and my daughter Hilarity, as joint tenants with a right of survivorship, so long as they continue to operate the building as an apartment, and so long as neither they, nor anyone to whom they convey the property, violates the legal rights of any tenant or prospective tenant in the building. If one of these restrictions is broken, then to my other daughter Ironica, so long as the building remains at all times at least 50% occupied. I leave all of my other assets to my son Donnie.”

When Hilarity and Donnie inherited the building, it was fully occupied. All leases were month-to-month leases beginning on the first of the month. Then:

* On January 1, the tenant in unit #1 approached Hilarity asking to be released from her lease. The tenant worked as a technology consultant and had been offered a job in Wisconsin setting up private email servers for wealthy executives. She had already paid her January rent, but said that she did not need it to be refunded if she could be released. Hilarity replied “Wisconsin? Never been there. But I am glad you are leaving. Email is ruining our society; people who use it become out of touch. We don’t want tech folks in our building.” The tenant vacated immediately. On January 2, Hilarity moved into unit #1.
* On January 10th, Donnie delivered a letter to the tenant in unit #2 (Gail Garcia) announcing that he and Hilarity were giving Garcia one month’s notice of nonrenewal. As reasons, the letter explained that the management “did not want non-citizens living in the building,” and that in any case, the tenant “had many, many children, far too many for the building, not like normal people,” and that this “violated building rules on the number of people who could live in an apartment of this size.” The lease included no such rule, nor had any occupancy limit ever been mentioned to Garcia before. Garcia lived in unit #2 with her three children (and with no other adult). A few days later, Donnie and Hilarity signed a lease for unit #2 with a married couple, Sam and Sally Smith, who planned to live there with their two children. The new lease was to begin on February 11th. When the Smiths arrived on that day, Gail Garcia was still in possession of unit #2.

Donnie and Hilarity wanted to put an addition onto the building. Doing so required that they install a drainage system to remove water from the marshland behind the building. Donnie borrowed money from the local bank, putting up his share of the building as collateral, so they could drain the swamp in anticipation of this project. Due to some confusion over a sloppy signature, the mortgage was indexed by the county recorder under the name Ronnie Dump, rather than Donnie Rump. This error was in both the grantor and the grantee index. The mortgage document filed with the recording office had the name spelled correctly. The date of recording was February 15th.

On February 20th, Donnie sold his interest in the building (using a general warranty deed that promised there were no encumbrances) to a real estate investor, Mike Sense. Sense recorded immediately.

Work on draining the swamp began on March 1. On July 1, an investigator from the Environmental Protection Agency (following a tip) inspected the construction site. The land behind the building had long been recognized as a legally protected wetland. The federal government quickly declared that the construction project was illegal, ordered a halt to construction, and also required that the building be vacated until the wetland is fully restored to its prior state. All of the tenants moved out of the building immediately. Because the environmental damage was extensive, no clear estimate could be given on how long restoration would take.

All of the events above took place within a single year. The following disputes have arisen. Please explain how they will likely be resolved by a court. Be sure to consider arguments that will be made on all sides. Do not comment on other possible disputes, unless resolving those disputes might be important to addressing the specific questions below. If more than one reason justifies an outcome, be sure to discuss all of the reasons. Make sure to consider how this case might come out differently depending on whether the events all take place in California or all in Nevada – i.e. depending on whether California or Nevada law applies. We have not studied Nevada law. You can assume that Nevada law differs in many respects from California law. If California has adopted the majority rule on some topic, Nevada has adopted the minority rule, and vice versa. Similarly, assume that Nevada has no statute prohibiting discrimination in housing. For the rule against perpetuities, assume Nevada applies the traditional common law version. In answering the questions below, in addition to class materials, you may use the case and statutes on the following pages (pages 4-8). Assume that the California Supreme Court has endorsed the reasoning of *Nat’l Packing Corp.* v. *Belmont*, but that the Nevada Supreme court has rejected it.

1. Who owns the apartment building? Claims to ownership have been advanced by Hilarity, Ironica, and Mike Sense.
2. The loan taken out by Donnie has not been repaid. Donnie remains personally liable for this loan. But he is broke. So the bank seeks to have the loan repaid by whoever owns the building – Hilarity, Ironica, or Sense. Can it collect from whichever of them owns the building? Even if you reached a definite conclusion on question 1, be sure to answer this question based on alternative assumptions on who owns the building.
3. Each possible owner of the building (Hilarity, Ironica, and Sense) seeks compensation from the federal government for the losses they experience due to the occupancy moratorium. The government will force the owner to pay for the restoration. The owner does not object to this expense. Must the government compensate? As with question 2, even if you reached a definite conclusion on question 1, be sure to answer this question based on alternative assumptions on who owns the building.
4. Mike Sense sues Donnie for violation of the warranties in the warranty deed. Be sure to consider how his claim will differ depending on whether he is declared the owner of the building.

Nat’l Packing Corp. v. Belmont

547 N.E.2d 373 (Ohio Ct. App. 1988)

DOAN, J.

In the instant appeal, we must determine whether to apply the venerable doctrine of *idem sonans* to the facts and circumstances set forth in the record. …

The record reveals that the plaintiff, National Packaging Corporation (“NPC”), sued Michael Bolan, d.b.a. Trade Packaging, in the Franklin County Court of Common Pleas. On November 25, 1983, NPC obtained a judgment for $3,331.76 plus interest; and, at a later time, it certified the judgment in Hamilton County, with Bolan’s name incorrectly spelled “B-O-L-E-N” in the docket book. At the time the judgment was certified, Michael Bolan owned property in Hamilton County at 8107 Camargo Road and 815 Indian Hill Road.

Bolan’s ex-wife, Elaine (now Elaine Belmont), brought a foreclosure action against the property located at 815 Indian Hill Road to collect overdue child-support payments. The property was sold in a sheriff’s sale to L. Michael and Elaine Belmont (Bolan’s ex-wife and her new husband). Because NPC’s judgment was filed under an incorrect spelling of Bolan’s name, NPC did not receive notice of the sheriff’s sale and was unable to protect its interest in the property.

The Belmonts subsequently sold the Indian Hill Road property to Richard E. and Vera DeCamp. It was only after this second conveyance that NPC brought its own foreclosure action, asserting the certified judgment from Franklin County against both the Indian Hill Road property and the Camargo Road property.

The Belmonts moved to dismiss NPC’s complaint in a filing that the trial court treated as a motion for summary judgment. The DeCamps then moved for summary judgment against NPC and the Belmonts. NPC responded with its own motion for summary judgment against the Belmonts and the DeCamps. On April 30, 1987, the trial court overruled NPC’s motion for summary judgment, entered summary judgment for the DeCamps and the Belmonts against NPC and held that the DeCamps’ motion for summary judgment against the Belmonts was moot. The court dismissed all other claims existing among these three parties, adding a Civ. R. 54(B) certification in a *nunc pro* [*tunc*] entry dated July 6, 1987, and this appeal followed.

In its single assignment of error, NPC asserts that the trial court erred to its prejudice by overruling its motion for summary judgment. Relying upon the doctrine of *idem sonans*,[[1]](#footnote-1)1 it argues that the certified judgment filed under a similar sounding but incorrect spelling of the debtor Bolan’s name, retaining the same initial letters as the correctly spelled name, should have been held to give rise to a valid lien for the benefit of NPC and to provide the appropriate constructive notice to title searchers.

The doctrine of *idem sonans* was adopted by the Ohio Supreme Court in *Lessee of Pillsbury* v. *Dugan’s Administrator* (1839), 9 Ohio 117. There the court held that Mrs. Pillsbury was on sufficient notice that her one-eighth interest in certain real estate was being adjudicated, even though the petition for partition listed her as “Pillsby.” Its reasoning was expressed in these terms:

“In adjudicating upon transactions occurring in the early settlement of our state, we must never forget the absence of precedents and system, the different usages introduced by people emigrating from every part of the country, the want of knowledge or neglect of technical learning, and the risk of loss of evidence from the lapse of time. Hence errors of form have always been overlooked, where the acts of a court are manifest, and its jurisdiction established. …

 “It is not every mistake in names which will invalidate an instrument or proceeding. *This effect will follow where the person can not be identified,* or where the error is such as to describe another. But words are intended to be spoken; and where the sound is substantially preserved, bad spelling will not vitiate. \* \* \*” (Emphasis added.) *Id.* at 119-120.

The petition in *Pillsbury* otherwise identified Mrs. Pillsbury by reference to her father, who died seized of the subject real estate, and to her apparent siblings and in-laws. Further, the petition correctly identified the real estate. Thus, she could be identified in spite of her misspelled name. …

The Ohio Supreme Court next mentioned the doctrine of *idem sonans* in *Buchanan* v. *Roy’s Lessee* (1853), 2 Ohio St. 251, a quiet-title action initiated by Nicholas Longworth. The court, in dicta, mused that the misspelling of Sarah Roy’s name as Sarah Ray, in a notice by publication, standing alone might be fatal to the action. Without squarely deciding the question, however, the court went on to note that Sarah Roy could otherwise be identified in the published notice. Thus the “otherwise identified” standard was carried forward from *Pillsbury* to *Buchanan.*

In 1869, the Ohio Supreme Court again dealt with *idem sonans,* this time in a criminal matter. In *Turpin* v. *State* (1869), 19 Ohio St. 540, a case involving an allegedly forged signature, there was a variance between the spelling of the name as it appeared on the state’s exhibit (“R-e-n-n-i-c-k” or “R-u-n-i-c-k”), and the spelling of the name as it appeared in an indictment (“R-e-n-i-c-k”). The court, however, found no fatal flaw in the variance … .

NPC cites *Rauch* v. *Immel* (1936), 55 Ohio App. 71, 23 Ohio Law Abs. 629, 8 O.O. 354, 8 N.E.2d 569, and *Horton* v. *Matheny* (1943), 72 Ohio App. 187, 27 O.O. 69, 51 N.E.2d 41, as the basis for validation of its claimed error. We note, however, that in *Rauch* the doctrine was applied to a misnomer in a notice of a lawsuit, and in *Horton* it was applied to a misspelling in a deed description. In these two cases, as in *Pillsbury, Buchanan,* and *Turpin,* the error did not involve misspellings in a name index.

The case of *Gleich* v. *Earnest* (1930), 36 Ohio App. 326, 173 N.E. 212, is NPC’s best authority because it is factually analogous to the instant matter. In *Gleich,* the court held that *idem sonans* validated the assertion of a mechanic’s lien against the purchaser of the property at a foreclosure sale, even though the foreclosure suit did not name the lienholder. The lienholder had filed its lien against “C. C. Ernest,” when in fact the property was held in the name of “Chester C. Earnest.” The court’s decision upholding the lienholder’s position rested upon the testimony of two abstractors who testified that they would have searched the records under both “Ernest” and “Earnest.”

In the matter *sub judice,* three experts have given affidavits stating that the doctrine of *idem sonans* should not be applied today as a standard for determining the marketable title of real estate on the basis of irregularities in last names or surnames, and that by custom it is not applied by abstractors in southwestern Ohio.

We hold that the doctrine of *idem sonans* is inapplicable to names that are misspelled in judgment-lien name indexes. We are not a frontier society of pioneers with little education or an absence of precedent and system. Since the Supreme Court issued its opinion in *Pillsbury* in 1839, we have experienced a tremendous growth in the population and the economy, and those developments have spawned countless real estate sales and a volume of litigation resulting in an abundance of indexed judgment liens. In modern society we cannot overlook matters of form by continuing to indulge the outmoded premises of our societal infancy. To impose rigidly the doctrine of *idem sonans* to name indexes now maintained for judgment liens would tax all land abstractors beyond reasonable limits and require them to be poets, phonetic linguists, or multilingual specialists. The additional time necessary to examine name indexes under such a stringent doctrine would make the examinations financially prohibitive.

The appellees, in their brief, demonstrate the difficulty in applying the doctrine of *idem sonans* to the range of spellings implicated in the instant case: Bolan, Bolen, Bolin, Bowlin, Bowlan, Bowlen, Bolun; the addition of double “l,” “ein,” and “ien” spellings does not even exhaust all conceivable spelling possibilities. The impossibility of the task created by the doctrine of *idem sonans* is further illustrated by the fact that we, as a society and state, are no longer a small homogeneous population primarily of European abstraction. Since our infancy, we have added Asian, African, South American, Oriental and Arabic surnames. The spelling, sound, and pronunciation of our population’s surnames create an insurmountable burden for an abstractor to face in appreciating all the possible variations. Under all the circumstances, a strict application of the doctrine today would leave a real estate purchaser with a lingering fear that misspelled lienholders, either negligently or deliberately, might be lurking under the *idem sonans* doctrine in the judgment-debtor indexes.

We further conclude that the misspelling of Bolan as “B-o-l-e-n,” does not rise to being “otherwise identifiable.” Unlike many states that statutorily require land descriptions with lien filings, Ohio’s indexes merely require a name.

Finally, with the exception of *Gleich,* the courts have not strictly applied *idem sonans.* We find instead a conditional application, which includes as a factor whether the individual is otherwise identified, and in only one case has the doctrine been applied to listings in a judgment-lien name index. We cannot, in sum, find any authority mandating strict application of the *idem sonans* doctrine. …

**California Government Code § 12955**

It shall be unlawful:

(a) For the owner of any housing accommodation to discriminate against or harass any person because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of that person.

[Sections (b) through (k) contain no relevant provisions and have been omitted]

(m) As used in this section, “race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information,” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

**California Code of Civil Procedure § 1161.4.**

 (a) A landlord shall not cause a tenant or occupant to quit involuntarily or bring an action to recover possession because of the immigration or citizenship status of a tenant, occupant, or other person known to the landlord to be associated with a tenant or occupant, unless the landlord is complying with any legal obligation under any federal government program that provides for rent limitations or rental assistance to a qualified tenant.

END OF EXAM

1. 1 The doctrine of idem sonans is defined in 70 Ohio Jurisprudence 3d (1986) 21-22, *Names*, Section 18, as follows:

“The arbitrary orthography and pronunciation given to proper names, and the variant spelling resulting from ignorance have led the courts to formulate the doctrine of `idem sonans,’ which means `sounding the same.’ Under this doctrine a mistake in spelling the name of a party is immaterial if both modes of spelling have the same sound. The grounds for applying the doctrine to slight variations in spelling is that of de minimis non curat lex – the principle that the law is not concerned with trifles. The general rule in Ohio seems to be that a change in the spelling of a word which does not alter its meaning, or in the spelling of a name where the idem sonans is preserved, is not a material variance. Thus, it is not every mistake in names which will invalidate an instrument or proceeding. To have this effect, the mistake must be such that a person cannot be identified, or that the error describes another. Since words are intended to be spoken, bad spelling will not vitiate their intended effect where the sound is substantially preserved.” [↑](#footnote-ref-1)