QUESTION I

Organization: This question was difficult to organize because it asked for two different kinds of issues: an evaluation of the form lease, and the application to the specific facts given. I found that the best answers illustrated the problems with the form lease by applying it to the facts given, so I will present the issues this way to avoid repetition. The order of presentation did not affect the grade.

Grounds for eviction:

I. Expiration of the lease: This issue depends on what the nature of the tenancy is. The original term expired, but the tenant continued paying rent without comment from the landlord. So there is a new tenancy, and jurisdictions are split as to whether there is a new one year term, or a month-to-month tenancy. [In no event would there be a year-to-year tenancy.] If the new tenancy is month-to-month, the landlord can evict with thirty days notice. The only defenses would be discrimination or retaliation (see below).

A. Double rent: This raises two issues: 1) is the lease clause valid; and 2) can it be applied here. The double rent term applies to a situation where a tenant has held over beyond the end of the term, the LL has refused to accept a new tenancy, and double rent is charged for the period in which the tenant is in effect trespassing. It thus serves as a penalty. In the case in the text, double rent was provided for by statute; the issue here is whether it can be compelled by contract. In a sense, this is a liquidated damages or penalty clause, and may be governed by contract principles. As a matter of landlord-tenant law, the issue is whether it provides the LL reasonable compensation for the inconvenience of dealing with a wrongful holdover, or whether it is an unconscionable penalty. I gave credit for any reasonable discussion.

On the facts of this case, however, the LL has effectively waived any ability to claim double rent because she has accepted rent beyond expiration of the original lease, creating a new tenancy.

B. Second’s status: First, the original tenant, entered into a new tenancy with the LL. What is Second’s status? First appears to have left with no intention of returning so if he transferred his interest to Second, it is likely to be an assignment, and the LL can thus sue her for damages.

1) The assignment violates the clause in the lease prohibiting assignments and subleases, leading to the following issues: a) Is the clause valid? Yes. Although it is a restraint on alienation, it is a partial restraint, recognized as valid by statute in CA and also valid at common law. b) Is the clause a dependent covenant and thus grounds for eviction? This is arguable either way, but there is some authority to support a violation as grounds for eviction. c) If grounds for eviction, has LL waived this right? Ordinarily restraints on alienation are disfavored, and LL’s acceptance of the first check from the assignee waives her right to evict. In this case, the facts state that the LL was unaware that First had left, and Second was in the apart. by herself. If the
II. Violation of the condition. The testator devised the building to Elkhorn so long as it is used "to house the Classics Department and Greek and Latin are taught in its classrooms." Elkhorn might argue that the building still houses what is left of the Classics Dept., viz., Greek classes, but the interpretation most consistent with the grantor's intent would seem to be that the condition has been violated.

III. Adverse possession. If this is a fee simple determinable, and the condition was violated, then title shifted to the heirs automatically in 1990. [There is no reference to a residuary clause, and in the heirs are the only possible claimants mentioned.] So for any statute of limitations shorter than 11 years, adverse possession should be an issue.
A. Actual and exclusive: There is no question that Elkhorn is in possession, its renovations constitute improvements, and it is used exclusively for college purposes. The presence of students, and even the public, do not interfere with the exclusivity of the use.
B. Open and notorious: This is the most complex issue. Elkhorn's possession is obvious, and therefore clearly open and notorious. What's not so obvious is violation of the condition. The announcement was not made to the alumni, and visual inspection of the premises would demonstrate a building with the words "Classics" etched in stone, and Greek classes offered more often than not. Nonetheless, abolition of the Department is a matter of public record, and Elkhorn's possession is clearly established.
C. Adverse and hostile: This depends on the jurisdiction. Elkhorn was not conscious of the restriction when they abolished the department, and they can easily meet the good faith test, and the objective test (assuming the other requirements have been met). They did not take possession, however, in violation of the condition knowing that title had passed, and intending to claim the property anyway. Therefore, they cannot meet the aggressive trespasser test unless they are deemed to be in possession under color of title. On the one hand, they are clearly in possession pursuant to a will. On the other, their possession is adverse because it violates the condition in the grant. So they should not be able to argue simultaneously that they have taken possession pursuant to a grant that they are expressly violating.
[Re: split in the jurisdictions, it's a basic policy issue, with the role of perjury constituting the major issue.]
D. Continuous: The possession is continuous unless you construed the Greek classes as a break in the violation of the condition. This argument is weak, however, because once title switches to the heirs, it doesn't revert back even if Elkhorn were to reestablish the Classic Department.

IV. Estoppel. If Elkhorn doesn't prevail on the basis of adverse possession, it would most likely be because no one realized it was happening and therefore the possession either wasn't open and notorious or adverse and hostile. If adverse possession fails on this ground, then estoppel should similarly fail because neither party was aware of the circumstances, and it is therefore hard to argue that Elkhorn relied on the heirs' inaction. Nonetheless, Elkhorn can clearly establish detriment in terms of their investment in alternative uses of the building, and they can argue that the heirs should have been paying attention to the change in use if they planned to claim the building. The balance of the hardships issue here is harder to make than in the case of an infringement. In Manillo, a short strip unimportant to the true owner was all that was at issue. Here, it's ownership of the entire disputed property. While the hardship on Elkhorn is substantial, the heirs stand to lose a presumably unique piece of land. Elkhorn's best argument is
LL could reasonably assume that Second was paying the rent for First (perhaps because she had done so before), then the LL could argue that she was mislead. Otherwise, she is likely to have waived her ability to evict.

2) Can Second be treated as a tenant in her own right? Yes. If the holdover tenancy is month-to-month, then at some point, Second becomes a tenant on her own, since whatever First had expired, and the LL continues to accept rent from Second directly. If First had a term of a year, however, and he left without a transfer of his interest to Second, then First could argue he abandoned the premises, the LL implicitly accepted his surrender, and Second created a new month-to-month tenancy on her own, not as a holdover, but a new tenant. The courts, however, are unlikely to release First from what would have otherwise been a new one year tenancy based on circumstances where the LL had no way of knowing that she was accepting a surrender. Second is therefore likely to be a new tenant, rather than an assignee, only if this jx treats holdover tenancies as month-to-month.

3) What are the terms of the Second’s tenancy? Treating Second as an assignee does not automatically mean that she is bound by the terms of First’s tenancy. First remains bound to those terms unless his tenancy comes to an end, but he is free to assign to Second on whatever terms he chooses. There is absolutely no indication that Second expressly agreed to assume First’s responsibilities under the lease so the LL is not a third party beneficiary. In addition, Second appears not have been aware of the terms of First’s lease so she cannot be held to those provisions. At the same time, First cannot change the terms of the lease simply by assigning it. The result: if Second has a month-to-month tenancy on her own, First’s lease is gone, and the default terms supplied by law apply. If Second has the rest of First’s term, the LL can evict for breach of the dependent covenants of the lease, and she can sue First, but not Second, for damages that result from violation of the provisions.

C. Defenses to termination of the tenancy

1) Retaliatory eviction: Although a LL can terminate a month-to-month tenancy any time she wants, she cannot do so in retaliation for legitimate complaints or protected activity. In this case, however, Second has not complained about conditions in the apartment, and a prima facie case of retaliation does not appear to exist. If the LL refuses to renew a month-to-month tenancy because of the tenant’s breach of independent covenants, this is not retaliation unless the LL can be characterized as punishing the tenant for her insistence that the LL make repairs essential to the IWH. In short, this is a weak argument.

2) Discrimination: If the LL is refusing to renew the month-to-month tenancy because of the pregnancy, then this would be discrimination (retaliation is relevant only if the activity is sufficiently protected to constitute discrimination, so retaliation adds nothing to the argument). This discussion has several parts: a) What is the status of the lease provision? The LL can attempt to evict First, even is she has a new year term, for violation of the reporting provision that requires notice to the LL of changes in status. The reporting requirement, however, is unlikely to be a dependent covenant and thus is not grounds for eviction. It is also unlikely in itself to give rise to damages. So it is largely unenforceable even if valid. Many students argued that the mere existence of the clause may be evidence of an intent to discriminate. The clause, however, has several legitimate purposes including both 1) notification of the number of people living in what may be a small apartment and 2) notification in changes in status that may affect the tenant’s ability to pay. In many jurisdictions, spouses are legally responsible for the other
spouse’s debts, especially with respect to basic living expenses such as rent, and domestic partners may contribute even if not obligated to do so, so the information is arguably relevant. The real issue is privacy, and a court may deal with that issue by narrowing construction rather declaring the entire clause invalid. So the clause is likely to be valid, impossible to enforce, and inconclusive as evidence of an intent to discriminate.

b) The more direct evidence of discrimination is the LL’s objection to the morality of Second’s non-marital pregnancy. 1) Is this discrimination on the basis of family status? Objection to the presence of children clearly would be, but as many students noted the baby has not yet been born, and there is no indication that the LL otherwise objects to the presence of children. To the extent that the LL objected to the non-marital relationship with First, the issue is unresolved whether this is discrimination on the basis of familial status as a matter of federal law (it is as a matter of state law in CA). If actionable, Second would then have to prove that the LL is refusing to renew her lease on the basis of a relationship that no longer exists, and that may be difficult to prove. 2) Is this discrimination on the basis of pregnant status per se? Unlikely, but if so, this may be sex discrimination. 3) Is this discrimination on the basis of religious beliefs? The LL objects to the morality of the unmarried pregnancy, but it’s not clear that she is doing so on the basis of a particular set of religious beliefs. If she objects to non-marital pregnancies on the basis of secular principles, or because single mothers are less credit-worthy, it may not be actionable. Conclusion: I suspect that the courts would find a way to declare that a refusal to renew a tenancy on the basis of a non-marital pregnancy is illegal discrimination (at least in NY and CA), but the precise grounds are not clear. Second would also have to show that the LL was in fact motivated by the pregnancy rather than the refusal to report the leaking pipes or make repairs.

II. Violation of the lease covenants: Since the lease does not specify that violation of the clauses are grounds for eviction, they are unlikely to be dependent covenants. The two issues with the greatest chance of success involve A) the assignment, subject to the waiver argument, and B) waste, not because of the failure to report or make repairs, but because of the failure to prevent substantial harm to other apartments or permanent damage to Second’s apartment.

III. Non-payment of rent: This is clearly grounds for eviction absent violation of the IWH. A. Has it been violated? Unlikely. Leaking pipes ordinarily do not violate the IWH in themselves. There must be mold, standing water, termites, rot, and some combination of unsafe or unsanitary conditions not mentioned here. B. If violated, has the LL been given notice and a chance to make repairs? Unlikely. Second does not appear to have notified the LL before withholding rent. It is arguable, however, that the LL knew because of complaints from other tenants, and the extent of the flooding may have been apparent from the complaints. There would still be an issue, however, of whether the LL had been given sufficient time to correct the problem, and whether Second is responsible for the condition. C. Construction of repair clause: If First has the responsibility for repairs, is he responsible for preventing violations of the IWH? The repair clause might be interpreted to exclude the leaking pipes to the extent that they 1) are a latent defect that may have existed before the tenancy; 2) extend beyond the apartment to common areas; or 3) involve major structural repairs. Narrow construction of the repair clause might shift responsibility to the LL. D. Validity of repair clause: If the repair clause is interpreted to place responsibility on First, and
if the failure to make the repairs results in a violation of the IWH, is the clause valid? 1) Can the IWH ever be waived as a matter of policy? 2) Is this shift in responsibility for repairs reasonable? Points to note: This appears to be a bargained for exchange since the amount is written in. The amount $50 is a relatively small reduction; $1000 per repair amounts to a wholesale shift in responsibility except for major structural defects likely to be outside of the clause anyway; and this is a large apartment building where the LL would be expected to assume responsibility for repairs, and repairs of this type – leaky pipes – can be expected to affect other apartments. On the other hand, most of the provisions, including not only the inspection and reporting requirements, but the responsibility for maintenance, would be implied as default provisions at common law. This clause is most likely to be valid if it is construed narrowly, but that might still include leaky pipes visible and accessible from Second’s apartment.

Conclusion: Second is likely to have a hard time defending an eviction for non-payment, primarily because the IWH may not have been violated, and if it were, the LL may not have been notified. If, however, the leaky pipes created major safety or sanitation issues, and the LL refused to take action, the repair clause may not protect the LL unless Second’s behavior was unreasonable.

IV. Suit for damages against Second: The LL can evict Second for non-payment or termination of the tenancy whatever her status because the LL can always terminate First’s tenancy on the same grounds. The LL may also be able to sue First for violation of the covenant of repair. Even if Second is an assignee, however, she is unlikely to have assumed responsibility for the specific provisions of the lease, and therefore the LL cannot sue her for damages arising from violation of the lease covenants even though they are in privity of estate. Nonetheless, if Second knew or had reason to know of the leaky pipes, did not report the problem to the LL, and took no action to prevent the damage occurring because of the leaks, she may liable to the LL irrespective of the lease provisions either on grounds of waste (the property cause of action) or in tort for negligence. The $1000 per repair limit is unlikely to apply to the damage caused by the failure to make the repair, and it would not protect Second if she did not agree to the lease. So unless the leaky pipes constitute a latent defect difficult to discover, Second is likely to be liable for the damages caused by the failure to take action. Waste was the most critical issue here.

QUESTION II

This question was designed to be a clear fee simple determinable, clearly violated, to set up an adverse possession question, with a possible estoppel issue.

I. Fee simple determinable. The language of the devise was based on the case in the text held to be a fee simple determinable. The “so long as” language is the classic language used to establish such an interest. The best counter-argument is that fee simples subject to a condition subsequent are preferred, and the CA case in the text in fact interpreted similar language to be a fee simple subject to a condition subsequent for policy reasons. CA is unusual, however, and influenced by its community property legacy.

The Rule against Perpetuities does not apply because the possibility of reverter is held by the grantor, not a third party.
that a large number of heirs can realize their interest in the property only by selling it, and that Elkhorn should be given a right of first refusal at market value. As a practical matter, the courts are more likely to broker a settlement in a case like this than to refuse to recognize the heirs’ ownership interest. Estoppel was therefore the more important argument to make here.