THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE
EXAMINATION.

SANTA CLARA UNIVERSITY
SCHOOL OF LAW
MID-TERM EXAMINATION

PROPERTY 104
PROFESSOR CARBONE

DECEMBER 13, 1994
FALL SEMESTER
3 HOURS

THE REVISED EXAMINATION RULES ISSUED IN JULY 1994 APPLY TO THIS
EXAMINATION EXCEPT THIS IS AN OPEN BOOK EXAMINATION.

INSTRUCTIONS: This exam consists of two parts. Part I consists of
20 multiple choice questions. Part II consists of 2 essay
questions. You may allocate your time as you like, but the exam
allots 1 hour for Part I and 2 hours for Part II. The credit given
will be proportional to the time allowed.

This is an open book exam. You may consult your textbook, the
Student Guide, any materials distributed in class, and your notes,
but not commercial outlines, books or treatises.
PART II (2 hours)

INSTRUCTIONS FOR PART II ONLY:

1. You are in a mythical jurisdiction in which there is very little law and in which the courts are influenced by precedents from other states. The courts imply, however, as a matter of common law, a warranty of habitability into all residential housing. The courts have never ruled on the issue of whether the implied warranty can be waived.

2. Unless you are typing the exam, please write your answers in the blue books provided. Write on every other line and on every other page. (I.e., do not write on the backs of the pages. The ink shows through.) Begin Question II in a separate bluebook. Write your social security number on the exam and on the outside of each bluebook.

3. There are two essay questions. The weight given each question is proportionate to the time allowed. Please pay close attention to the instructions given as to how you are to answer each question.

QUESTION I (1 hour)

Ginger Rich loses her engineering job and she and her husband, Newt, decide to open a restaurant. They enter into a 5 year lease, renting a two story building from Foley. The first floor consists of a store front suitable for use as a restaurant, and the second floor contains a two bedroom apartment. The lease states, among other things, that:

1. Tenant may assign or sublet the premises only with the express written consent of the Landlord.

2. Tenant shall be responsible for all repairs, maintenance, alterations, and utilities. Tenant may modify the premises only with the express written consent of the Landlord. Tenant shall insure that all activities conducted on the premises are in compliance with applicable laws and regulations, and that the condition of the premises remains in compliance with applicable building or housing codes.

After two years of operation, the restaurant is still struggling to turn a profit, and Ginger and Newt decide that they can make more money by renting out the second floor apartment and living elsewhere. They enter into an oral month-to-month tenancy with Mitchell, who pays rent directly to Ginger and Newt. Mitchell has a young son with asthma, and discovers, shortly after moving in, that ventilation in the building is such that aromas from the restaurant kitchen flow directly into his son's bedroom. The problem becomes particularly acute when Ginger and Newt fry spicy
red peppers, a common ingredient in the restaurant’s cuisine. Mitchell’s son likens the effect to "tear gas," and is not able to enter the bedroom at all at such times. Mitchell has complained to the housing authority, but the inspectors have found no violations. [In this jurisdiction, the housing code covers only structural requirements and does not apply directly to habitability.] Mitchell has also complained repeatedly to Ginger and Newt, all to no avail. Three months after moving into the apartment, he withholds rent in protest.

In the meantime, Ginger and Newt also permit their employees to live in the back room on the first floor from time to time. One of the employees, Dole, is injured in an automobile accident and unable to work, but Ginger and Newt permit him to continue living there for $20 a week. Dole sometimes shares the room with another employee (the employees tend to come and go) and Ginger and Newt store some of the restaurant supplies there. Dole has also been bothered by the frying of the red peppers, and when he learns that Mitchell has withheld rent in protest, he too stops paying Ginger and Newt.

Ginger and Newt investigate the matter and discover that it would cost thousands of dollars and involve major structural changes to eliminate the problem. They have approached Foley, the landlord, who insists that the responsibility for dealing with the matter is theirs.

Foley comes to you for advice. He tells you that, until his recent conversation with Ginger and Newt, he did not know that Mitchell or Dole were living there. He also tells you that he would not have approved an assignment or sublease because he believes that he would make more money if he could rent the apartment and restaurant separately. Advise Foley as to any possible basis 1) he has to evict Ginger and Newt; 2) Ginger and Newt have to withhold rent or to terminate their lease with Foley; 3) he has to recover back rent from Mitchell or Dole if Ginger and Newt fail to pay the full rent, and 4) Ginger and Newt have to evict either Mitchell or Dole.

[You may assume for purposes of this question that Dole’s residence in the back room is not, in itself, illegal.]

QUESTION II (1 hour)

Congratulations! The year is 1955 and you are a law clerk to a Justice of the Supreme Court. The Court has recently heard the case of Tee-Hit-Ton Indians v. the United States and Justice Stanley Reed has circulated the opinion that begins on p. 36 of the text as the proposed opinion of the Court. The Justice for whom you clerk has read the draft and disagrees with the way in which Justice Reed characterizes Justice Marshall’s opinion in M’Intosh. Your justice informs you that he has not yet decided whether to
write a concurrence or a dissent, but that he is inclined to write a separate opinion that will focus on the relevance of Johnson v. M'Intosh to the issue in the Tee-Hit-Ton case. Write a memorandum discussing 1) what the M'Intosh case held with respect to Native American property claims; 2) any basis for criticizing Reed’s use of the M'Intosh case in the opinion that begins at p. 36; 3) the way you would characterize M'Intosh to support a concurrence; 4) the way you would characterize M'Intosh to support a dissent; and 5) whether a concurrence or a dissent in the Tee-Hit-Ton case would be more consistent with the ruling in M'Intosh.

[Hint: most students will find it harder to explain how M'Intosh can be read to support the side with which side they disagree, and should therefore plan to spend more time on that issue.]

END OF EXAMINATION HAPPY HOLIDAYS!