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Mortgages

1. If the issue of ownership of the man's note and mortgage is subsequently raised in an appropriate action by the bank to foreclose, the court should hold that

A man executed and delivered a promissory note and a mortgage securing the note to a mortgage company, which was named as payee in the note and as mortgagee in the mortgage. The note included a statement that the indebtedness evidenced by the note was "subject to the terms of a contract between the maker and the payee of the note executed on the same day" and that the note was "secured by a mortgage of even date." The mortgage was promptly and properly recorded. Subsequently, the mortgage company sold the man's note and mortgage to a bank and delivered to the bank a written assignment of the man's note and mortgage. The assignment was promptly and properly recorded. The mortgage company retained possession of both the note and the mortgage in order to act as collecting agent. Later, being short of funds, the mortgage company sold the note and mortgage to a woman at a substantial discount. The mortgage company executed a written assignment of the note and mortgage to the woman and delivered to her the note, the mortgage, and the assignment. The woman paid value for the assignment without actual knowledge of the prior assignment to the bank and promptly and properly recorded her assignment. The principal of the note was not then due, and there had been no default in payment of either interest or principal.

- The woman owns both the note and the mortgage
- **The bank owns both the note and the mortgage**
- The woman owns the note, and the bank owns the mortgage
- The bank owns the note, and the woman owns the mortgage

Note:

When answering a question about chain of title, it can be helpful to diagram out the facts stated in the question. All parties to a mortgage or deed of trust can transfer their interests. Ordinarily, the mortgagor transfers by deeding the property while the mortgagee usually transfers by endorsing the note and executing a separate assignment of the mortgage. The note and mortgage must pass to the same person for the transfer to complete.

B is correct. The mortgage company sold the man's note and mortgage to the bank, delivered to the bank a written assignment of the same, and the bank promptly and properly recorded that assignment. When the woman purchased that same note and mortgage from the mortgage company at a later date, the bank had already recorded its interest in both. The bank's prompt and proper recording of the assignment secured its ownership of that assignment, and put the woman on notice that it had already been sold.

A is incorrect. The bank's recording protected its ownership.

C is incorrect. The woman's purchase of the note does not protect her interest, because the bank properly recorded.

D is incorrect. As explained above, the bank had properly purchased and recorded the mortgage.

2. If the court rules that the elderly widow's mortgage is entitled priority over the woman's mortgage, which of the following determinations are necessary to support that ruling?

The \$50,000 debt secured by the woman's mortgage was not paid when it was due, and the woman brought an appropriate action to foreclose, joining the owner, the businessman, and the elderly widow as defendants and alleging that the woman's mortgage was senior to the elderly widow's mortgage on Blackacre. The owner of Blackacre in fee simple mortgaged Blackacre to a man to secure a loan of \$100,000. The mortgage was promptly and properly recorded. The owner later mortgaged Blackacre to a woman to secure a loan of \$50,000. The mortgage was promptly and properly recorded. Subsequently, the owner conveyed Blackacre to a businessman. About a year later, the businessman borrowed \$100,000 from an elderly widow and gave her a mortgage on Blackacre to secure repayment of the loan. The elderly widow did not know about the mortgage held by the woman. The understanding between the businessman and the elderly widow was that the businessman would use the \$100,000 to pay off the mortgage held by the man and that the elderly widow would, therefore, have a first mortgage on Blackacre. The elderly widow's mortgage was promptly and properly recorded. The businessman paid the \$100,000 received from the elderly widow to the man and obtained and recorded a release of the man's mortgage.

- The man's mortgage was originally senior to the woman's mortgage, the elderly widow is entitled to have the man's mortgage revived for her benefit, and the elderly widow is entitled to be subrogated to the man's original position as senior mortgagee
- The man's mortgage was originally senior to the woman's mortgage and there are no countervailing equities in favor of the woman
- There are no countervailing equities in favor of the woman, the elderly widow is entitled to have the man's mortgage revived for her benefit, and the elderly widow is entitled to be subrogated to the man's original position as senior mortgagee
- **The man's mortgage was originally senior to the woman's mortgage, there are no countervailing equities in favor of the woman, and the elderly widow is entitled to have the man's mortgage revived for her benefit and be subrogated to the man's original position as senior mortgagee**

Note:

The question asks you to analyze why the court would rule against the landowner. This is essentially a hypothetical asking you IF the court did something, WHY did they do it. To tackle a question like this, you have to look at all the answer choices and decide which scenario would make the hypothetical situation stated in the call occur. The general rule of priority is the same for real property security as for personal property security: the first in time to give notice of the secured interest is first in right.

For real property, the notice is by recording the mortgage. Recording is the act of giving public notice of changes in interests in real estate. A mortgage is valid between the parties whether or not it is recorded, but a mortgagee might lose to a third party - another mortgagee or a good-faith purchaser of the property - unless the mortgage is recorded.

When there are multiple mortgages given on a property, and none are purchase money mortgages, priority is determined according to which mortgage came first in time. However, under the doctrine of equitable subrogation, a person other than the mortgagor who pays off a mortgage can step into the shoes of the now-paid-off mortgagee.

D is correct. In this case, the original order is the man's mortgage, the woman's mortgage, conveyance to the businessman, and finally the widow's mortgage. Therefore, in order for the court to find that the widow's mortgage has priority over the woman's mortgage, it must treat the agreement between the businessman and the widow as a subrogation of rights, by which the widow purchased the man's mortgage. If the man's mortgage was originally senior to the woman's mortgage, and the elderly widow is entitled to have the man's mortgage revived for her benefit and be subrogated to the man's original position as senior mortgagee, then the man's mortgage (now held by the elderly widow) is senior to the woman's, and the elderly widow is entitled to hold the man's position as the first mortgagee. Therefore, both determinations are required. Finally, it is possible that the woman could have an equitable argument against the transfer, as the agreement was not technically between the first mortgagee and the widow, making this determination necessary as well.

A is incorrect. This answer has the correct answer, but the wrong conclusion. While the woman is entitled to have the mortgage revived for her own benefit, it requires both determinations, as explained above.

B is incorrect. The countervailing equities of subrogation and improper transfer make this answer incomplete.

C is incorrect. This answer is also incomplete. It does not include that the woman's mortgage was originally senior to the man's, which is integral to finding that the woman's mortgage should be revived.

3. In the action, the court will likely rule in favor of which party?

The bank brought an appropriate action to enjoin the vendor from its proposed repossession of the window inserts. This year, the man has suffered severe financial reverses and has defaulted on his mortgage obligation to the bank and on his obligation to the vendor. The new windows were expensive. The man purchased them on credit, signed a financing statement, and granted a security interest in the windows to a vendor, the supplier of the windows. The vendor promptly and properly filed and recorded the financing statement before the windows were installed. The man stored the old windows in the basement of Blackacre. Each new window consists of a window frame with three inserts: regular windows, storm windows, and screens. The windows are designed so that each insert can be easily inserted or removed from the window frame without tools to adjust to seasonal change and to facilitate the cleaning of the inserts. A man owns his home, Blackacre, which was mortgaged to a bank by a duly recorded purchase money mortgage. Last year, the man replaced all of Blackacre's old windows with new windows.

- The bank, because its mortgage was recorded first
- The bank, because the windows and screens, no matter their characteristics, are an integral part of a house
- **The vendor, because the inserts are removable**
- The vendor, because the availability of the old windows enables the bank to return Blackacre to its original condition

Note:

A mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money. A mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower.

Liens that have attached to the title before the mortgage lien are said to be senior to, or prior to, the mortgage lien. Those attaching afterward are said to be junior or subordinate. The purpose of this priority is to establish the order in which lienholders are entitled to foreclose their liens in order to recover their debts. If a property's title has multiple mortgage liens and the loan secured by a first mortgage is paid off, the second mortgage lien will move up in priority and become the new first mortgage lien on the title.

A fixture is a chattel that has been so affixed to land that it has ceased being personal property and has become part of the realty. Fixtures are typically a permanent part of realty such that damage would occur if they were removed. A court will consider the degree to which the item is attached, whether there will be damage to the structure if the item is removed, and whether general custom dictates that such an item stays with a property or goes out with the seller.

C is correct. The outcome of this question is contingent upon whether the window inserts are fixtures or not. Considering that there is a low degree of attachment (the inserts are "easily removable") and no damage will result from the removal, the inserts will not be considered fixtures. The window frames, however, would likely be fixtures. Therefore, the vendor may enforce its lien by repossessing the window inserts.

A is incorrect. Although the bank's mortgage has priority over the vendor's, whether the vendor can remove the window inserts depends upon whether they are regarded as fixtures. The bank's mortgage on the home will be limited to the structure and any items attached to it that have become fixtures.

B is incorrect because it suggests that the window inserts are fixtures. Under the concept of fixtures, a chattel that has been annexed to real property is converted from personal property into real property. However, as explained above, the window inserts are not fixtures because they are easily removable and no damage will result from their removal.

D is incorrect. This answer choice comes to the correct conclusion under the wrong reasoning. As stated above, the reason the vendor will prevail is that the window inserts are not fixtures, not because of the availability of the old windows.

4. The bank is entitled to collect a deficiency judgment against

In an appropriate foreclosure action, the bank joined the woman, her friend, and the son as defendants. At the foreclosure sale, although the fair market value for Woodsedge in its depreciated state was obtained, a deficiency resulted. There is no applicable statute or regulation. After the son made three timely payments, no further payments were made by any party. In fact, the real estate had depreciated to a point where it was worth less than the debt. A woman owned Woodsedge, a tract used for commercial purposes, in fee simple and thereafter mortgaged it to a bank. She signed a promissory note secured by a duly executed and recorded mortgage. There was no "due on sale" clause, that is, no provision that, upon sale, the whole balance then owing would become due and owing. The woman conveyed Woodsedge to a friend "subject to a mortgage to the bank, which the grantee assumes and agrees to pay." The friend conveyed Woodsedge to his son "subject to an existing mortgage to the bank." A copy of the note and the mortgage that secured it had been exhibited to each grantee.

- The woman only
- **The woman and the friend only**
- The friend and his son only
- The woman, the friend, and the son

Note:

The general rule of priority is the same for real property security as for personal property security: the first in time to give notice of the secured interest is first in right. For real property, the notice is by recording the mortgage. Recording is the act of giving public notice of changes in interests in real estate. Recording was created by statute; it did not exist at common law. The typical recording statute calls for a transfer of title or mortgage to be placed in a particular county office, usually the auditor, recorder, or register of deeds.

A mortgage is valid between the parties whether or not it is recorded, but a mortgagee might lose to a third party- another mortgagee or a good-faith purchaser of the property - unless the mortgage is recorded.

The property can be sold without paying off the mortgage if the mortgage is assumed by the new buyer, who agrees to pay the seller's (the original mortgagor's) debt. This is a novation if, in approving the assumption, the bank releases the old mortgagor and substitutes the buyer as the new debtor.

The buyer need not assume the mortgage. If the buyer purchases the property without agreeing to be personally liable, this is a sale "subject to" the mortgage. In the event of the seller's subsequent default, the bank can foreclose the mortgage and sell the property that the buyer has purchased, but the buyer is not liable for any deficiency.

B is correct. As explained above, a mortgagor is free to transfer the title of property BUT: (i) the mortgagor remains personally liable on the mortgage; and (ii) all subsequent grantees take the property subject to the mortgage. Further, subsequent grantees do not become personally liable on the mortgage unless they explicitly assume the mortgage. Subsequent grantees can lose the land through foreclosure if the mortgage is not paid.

In this case, the woman is the mortgagor, and she was not fully released from the obligations of the mortgage because she did not get a novation from the bank. The friend explicitly assumed and agreed to pay the mortgage, so he will also be personally liable for the mortgage.

A is incorrect. Although the woman will still be personally liable for the mortgage because she did not receive a novation releasing her from liability by the bank, the friend will also be personally liable because he assumed the responsibility of the mortgage and agreed to pay it.

C is incorrect. As explained above, the woman did not get a novation relieving her of liability from the bank, so she would still be liable on the mortgage. The son only took the property subject to the mortgage, so he is not personally liable for the debt.

D is incorrect. As explained above, the son will not be personally liable for the mortgage because he did not personally assume the mortgage.

5. Which of the following best states the parties' rights in Blackacre?

Now, the owner has defaulted on repayment with \$55,000 still due on the loan. The owner is still in possession. The owner of Blackacre needed money. Blackacre was fairly worth \$100,000, so the owner tried to borrow \$60,000 from a lender on the security of Blackacre. The lender agreed, but only if the owner would convey Blackacre to the lender outright by warranty deed, with the lender agreeing orally to reconvey to the owner once the loan was paid according to its terms. The owner agreed, conveyed Blackacre to the lender by warranty deed, and the lender paid the owner \$60,000 cash. The lender promptly and properly recorded the owner's deed.

- The lender's oral agreement to reconvey is invalid under the Statute of Frauds, so the lender owns Blackacre outright
- The owner, having defaulted, has no further rights in Blackacre, so the lender may obtain summary eviction
- The attempted security arrangement is a creature unknown to the law, hence a nullity; the lender has only a personal right to \$55,000 from the owner
- **The lender may bring whatever foreclosure proceeding is appropriate under the laws of the jurisdiction**

Note:

A security interest in real estate operates to secure some other obligation, usually a promise to repay a loan, which is represented by a promissory note. If the loan is not paid when due, the holder of the security interest can either take title to the real estate or have it sold and use the proceeds to pay the debt with accrued interest and any legal and court costs.

A landowner needing to raise money may "sell" the land to a person who will pay cash and may give the "buyer" an absolute deed rather than a mortgage. This may seem to be safer than a mortgage loan to a creditor and may seem to have tax advantages. However, if the court concludes, by clear and convincing evidence, that the deed was really given for security purposes, they will treat it as an "equitable" mortgage and require that the creditor foreclose it by judicial action, like any other mortgage. This result will be indicated by the following factors: (i) the existence of a debt or promise of payment by the deed's grantor; (ii) the grantee's promise to return the land if the debt is paid; (iii) the fact that the amount advanced to the grantor/debtor was much lower than the value of the property; (iv) the degree of the grantor's financial distress; and (v) the parties' prior negotiations.

D is correct. The lender does not own Blackacre outright; he holds an equitable mortgage. Because the lender's interest is a mortgage on the property rather than outright ownership of it, his only remedy following the owner's default is foreclosure of the property pursuant to the equitable mortgage.

A is incorrect. The agreement to reconvey is not a land sale contract and is therefore not subject to the Statute of Frauds.

B is incorrect. A court must determine the rights of a mortgagor and mortgagee in relation to a default on the mortgage, and the vehicle for that determination is a foreclosure proceeding, not an eviction proceeding.

C is incorrect. The arrangement is an equitable mortgage, not a nullity.

6. In this action, judgment should be for

The friend took possession of Goldacre and made several mortgage payments, which the bank accepted. Now, however, neither the friend nor the carpenter has made the last three mortgage payments. The bank has brought an appropriate action against the friend for the amount of the delinquent payments. Several years ago, a carpenter purchased Goldacre, financing a large part of the purchase price by a loan from a bank that was secured by a mortgage. The carpenter made the installment payments on the mortgage regularly until last year. Then the carpenter persuaded a friend to buy Goldacre, subject to the mortgage to the bank. They expressly agreed that the friend would not assume and agree to pay the carpenter's debt to the bank. The carpenter's mortgage to the bank contained a due-on-sale clause stating, "If Mortgagor transfers his/her interest without the written consent of Mortgagee first obtained, then at Mortgagee's option the entire principal balance of the debt secured by this Mortgage shall become immediately due and payable." However, without seeking the bank's consent, the carpenter conveyed Goldacre to the friend, the deed stating in pertinent part ". . . subject to a mortgage to the bank [giving details and recording data]."

- **The friend, because she did not assume and agree to pay the carpenter's mortgage debt**
- The friend, because she is not in privity of estate with the bank
- The bank, because the carpenter's deed to the friend violated the due-on-sale clause
- The bank, because the friend is in privity of estate with the bank

Note:

A mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money. A mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower.

The mortgagor of a property is generally free to transfer title to that property BUT: (i) the mortgagor remains personally liable on the mortgage; and (ii) all subsequent grantees take the property "subject to" the mortgage. Subsequent grantees do not become personally liable on the mortgage unless they explicitly assume the mortgage. In sum, the mortgagor will always be personally liable on the mortgage, only subsequent grantees who assume the mortgage will be personally liable on it, and all subsequent grantees (whether they assume the mortgage or not) can lose the property through foreclosure if the mortgage is not paid.

Privity of estate arises when the parties share a relationship with the land (e.g., a landlord and a tenant).

A is correct. The facts state that the carpenter and the friend "expressly agreed that the friend would not assume and agree to pay the carpenter's debt to the bank." The friend thus did not assume the mortgage, which means she has no personal liability to the bank with regard to the mortgage payments. Although she voluntarily made payments for a few months, she was under no contractual obligation to do so. And when the carpenter conveyed Goldacre to the friend without first obtaining written consent from the bank as required by the due-on-sale clause, this allowed the bank to demand immediate payment of the entire outstanding mortgage balance from the carpenter (not the friend). However, the friend may still lose the property because the bank has the right to foreclose on the mortgage if the payments are not made by anyone.

B is incorrect. This answer reaches the correct answer with the wrong reasoning. Judgment should be for the friend, but not because she is not in privity of estate with the bank. Because the friend did not assume the mortgage, privity is not an issue. A buyer may purchase property that is "subject to" a mortgage, meaning she will not be personally liable for the mortgage payments. Here, the property was "subject to" a mortgage that the friend did not assume. The carpenter's failure to ensure that payments were made gives the bank the right to foreclose, but not to hold the friend personally liable for payments.

C is incorrect. The call of the question asks who judgment should be for in the suit by the bank against the friend, not the carpenter. The bank may have an immediate demand against the carpenter for the full amount of the mortgage balance for violating the due-on-sale clause, but the issue presented is whether the bank can recover from the friend. As explained above, the bank may not hold the friend liable because she did not assume the mortgage, and her rights are unaffected by the due-on-sale clause.

D is incorrect. This is a misapplication of the rules governing privity. As previously explained, the friend did not assume the mortgage that the carpenter had secured through the bank. As a result, the friend was not in privity with the bank, so this is not a relevant issue here.

7. In such action, the sister should

A brother and sister owned Greenacre in fee simple as tenants in common, each owning an undivided one-half interest. The brother and sister joined in mortgaging Greenacre to a private lender by a properly recorded mortgage that contained a general warranty clause. The brother became disenchanted with land-owning and notified his sister that he would no longer contribute to the payment of installments due to the private lender. After the mortgage was in default and the private lender made demand for payment of the entire amount of principal and interest due, the sister tendered to the private lender, and the private lender deposited, a check for one-half of the amount due the private lender. The sister then demanded a release of her undivided one-half interest. The private lender refused to release any interest in Greenacre. The sister promptly brought an action against the private lender to quiet title to an undivided one-half interest in Greenacre.

- Lose, because the private lender's title had been warranted by an express provision of the mortgage
- **Lose, because there was no redemption from the mortgage**
- Win, because the sister is entitled to marshalling
- Win, because the cotenancy of the mortgagors was in common and not joint

Note:

A tenancy in common is a concurrent estate with no right of survivorship. Each owner has a distinct, undivided interest in the property. Each co-tenant has a duty to pay her share of payments due on the mortgages on the entire property. A tenant who is not in sole possession can pay the mortgage payments and then compel contribution from the other tenant(s).

A mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money. A mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower.

At any time prior to the foreclosure sale, the mortgagor has the right to redeem the land or free it of the mortgage by paying off the amount due, together with any accrued interest. A mortgagor's right to redeem her own mortgage cannot be waived in the mortgage itself.

B is correct. Although the brother and sister each independently own an undivided one-half interest in Greenacre, they chose to mortgage the property jointly. Therefore, the private lender holds a mortgage to all of Greenacre, for which the brother and the sister are jointly and severally liable. The joint mortgage represents a contractual agreement between the brother and the sister as a single entity on the one hand, and the private lender on the other. The sister's making a payment of half of what is owed on the mortgage has the same legal effect as paying off half of any debt - the rest of the debt is still owed. To protect her one-half interest, the sister should have obtained a mortgage on only her own interest. That would have left her rights unaffected by any actions or inactions of the brother

A is incorrect. While it is correct that the sister should lose, this is not the reason why. As explained above, the right of redemption cannot be waived through any express language in the mortgage contract.

C is incorrect. The doctrine of marshalling states that if a creditor has access to two sources of payment, he shall take his payment out of that fund upon which another creditor has no access or lien. This does not apply here, because the brother and sister jointly acquired the mortgage.

D is incorrect. Whether the tenancy was in common or joint is not relevant to this question. The brother and sister are still both jointly and severally liable for the mortgage because they got the mortgage together.

8. The \$200,000 surplus arising from the bid paid by the bank for the parking garage should be paid

The bank purchased the parking garage for an amount that is \$200,000 in excess of the private lender's mortgage balance. The bank purchased the hotel for \$100,000 less than its mortgage balance. The bank later brought an appropriate action for judicial foreclosure of its first mortgage on the hotel and of its judgment lien on the parking garage. The private lender was joined as a party defendant and appropriately counterclaimed for foreclosure of its mortgage on the parking garage, which was also in default. All procedures were properly followed and the confirmed foreclosure sales resulted as follows: There is no other applicable statute, except the statute providing for judicial foreclosure of mortgages, which places no restriction on deficiency judgments. A statute of the jurisdiction provides: "Any judgment properly filed shall, for 10 years from filing, be a lien on the real property then owned or subsequently acquired by any person against whom the judgment is rendered." A business owner owned a hotel, subject to a mortgage securing a debt the owner owed to a bank. The owner later acquired a nearby parking garage, financing a part of the purchase price by a loan from a private lender, secured by a mortgage on the parking garage. Two years thereafter, the owner defaulted on the loan owed to the bank, which caused the full amount of that loan to become immediately due and payable. The bank decided not to foreclose on the mortgage on the owner's hotel at that time, but instead brought an action, appropriate under the laws of the jurisdiction and authorized by the mortgage loan documents, for the full amount of the defaulted loan. The bank obtained and properly filed a judgment for that amount.

- **\$100,000 to the bank and \$100,000 to the owner**
- \$100,000 to the private lender and \$100,000 to the owner
- \$100,000 to the bank and \$100,000 to the private lender
- \$200,000 to the owner

Note:

Foreclosure is a process by which the mortgagor's interest in the property is terminated. The property is generally sold to satisfy the debt in whole or in part. Generally, the priority of the mortgage is determined by the time it was placed on the property. When a mortgage is foreclosed, the buyer at the sale will take title as it existed when the mortgage was placed on the property. Thus, a foreclosure will terminate interests junior to the mortgage being foreclosed, but will not affect senior interests.

Junior mortgages, liens, leases, easements, and all other interests will be wiped out if they are junior to the mortgage being foreclosed. If a lien senior to that of the mortgagee is in default, the junior mortgagee has the right to pay it off in order to avoid being wiped out by its foreclosure. Thus, those with interests subordinate to those of the foreclosing party are necessary parties to the foreclosure action. Failure to include a necessary party results in the preservation of the party's interest despite foreclosure and sale.

Foreclosure does not affect any interest senior to the mortgage being foreclosed. The buyer takes subject to such an interest and does not become personally liable on such senior investments.

The proceeds of the foreclosure sale are used, first, to pay expenses of the sale, attorneys' fees, and court costs, and then to pay the principal and accrued interest on the loan that was foreclosed, next to pay off any junior liens or other junior interests in the order of their priority, and finally, any remaining proceeds are distributed to the mortgagor.

If the proceeds of the sale are insufficient to satisfy the mortgage debt, the mortgagee can bring a personal action against the mortgagor/debtor for the deficiency.

A is correct. This question is most easily answered by diagramming the amounts each party owes or is owed. After the judicial foreclosure sale of the hotel, the bank was still owed \$100,000. After the foreclosure sale of the garage, the private lender was owed nothing and had a surplus of \$200,000. After both foreclosures were completed, the owner owed \$100,000 to the bank and owed nothing to the private lender.

B is incorrect. The private lender is owed nothing and cannot get any of the surplus.

C is incorrect. The private lender is owed nothing and is not entitled to any of the surplus.

D is incorrect. The bank, as a mortgagee, stands ahead of the owner in the line of priority and must receive all the money it is owed before the owner will be entitled to receive anything. Once the bank has been paid the remaining \$100,000 it is owed, any surplus (which in this case is \$100,000) will go to the owner.

During the course of the harvest, a business invitee was injured by reason of a fault in the equipment used. Under applicable tort case law, the owner of the premises would be liable for the business invitee's injuries. The business invitee brought an appropriate action against the lender to recover damages for the injuries suffered, relying on this aspect of tort law. The owner in fee simple of Orchardacres, mortgaged Orchardacres to a lender to secure the payment of a loan the lender made to the owner. The loan was due at the end of the growing season of the year in which it was made. The owner maintained and operated an orchard on the land, which was his sole source of income. Halfway through the growing season, the owner experienced severe health and personal problems and, as a result, left the state; his whereabouts were unknown. The lender learned that no one was responsible for the cultivation and care of the orchard on Orchardacres. The lender undertook to provide, through employees, the care of the orchard and the harvest for the remainder of the growing season. The net profits were applied to the debt secured by the mortgage on Orchardacres.

- Note:

B is correct. The lender was the mortgagee of Orchardacres. A mortgage conveys an interest in land as security for an obligation that the owner of that land owes to the creditor (the lender). The lender has certain rights prior to an action for default against the owner for the non-payment of the mortgage. The lender was aware that the owner had abandoned Orchardacres. As the mortgagee, the lender had the right to enter Orchardacres to correct a situation that would have created waste of the property via the loss of income from the abandoned crops. When the lender utilized their interest in Orchardacres by entering the property and running it, the lender took possession of the property subject to their interest in it as mortgagee. As such, the lender was in the position of an owner, not an agent, so the business invitee will prevail in his action.

C is incorrect. The lender was not an agent of the owner. There are no facts in this question that suggest that the lender was acting on behalf of the owner's interest, or owed any fiduciary duties to the owner.

D is incorrect. This is the correct conclusion, but wrong legal reasoning. When the mortgagor abandons the premises and stops paying their mortgage, the mortgagee is entitled to take possession and administer the property to maintain the value of his security interest.

10. In this action, for whom should the court render judgment?

An investor purchased a tract of commercial land, financing a large part of the purchase price with a loan from a business partner that was secured by a mortgage. The investor made the installment payments on the mortgage regularly for several years. Then the investor persuaded a neighbor to buy the land, subject to the mortgage to his partner. They expressly agreed that the neighbor would not assume and agree to pay the investor's debt to the partner. The investor's mortgage to the partner contained a due-on-sale clause stating, "If Mortgagor transfers his or her interest without the written consent of Mortgagee first obtained, then at Mortgagee's option the entire principal balance of the debt secured by this Mortgage shall become immediately due and payable." However, without seeking his partner's consent, the investor conveyed the land to the neighbor, the deed stating that it was "subject to a mortgage to [the partner]" and giving details and recording data related to the mortgage. The neighbor took possession of the land and made several mortgage payments, which the partner accepted. Now, however, neither the neighbor nor the investor has made the last three mortgage payments. The partner has sued the neighbor for the amount of the delinquent payments.

- **The neighbor, because she did not assume and agree to pay the investor's mortgage debt**
- The neighbor, because she is not in privity of estate with the partner
- The partner, because the investor's deed to the neighbor violated the due-on-sale clause
- The partner, because the neighbor is in privity of estate with the partner

Note:

A mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money. A mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower.

The mortgagor of a property is generally free to transfer title to that property BUT: (i) the mortgagor remains personally liable on the mortgage; and (ii) all subsequent grantees take the property "subject to" the mortgage. Subsequent grantees do not become personally liable on the mortgage unless they explicitly assume the mortgage. In sum, the mortgagor will always be personally liable on the mortgage, only subsequent grantees who assume the mortgage will be personally liable on it, and all subsequent grantees (whether they assume the mortgage or not) can lose the property through foreclosure if the mortgage is not paid.

Privity of estate arises when the parties share a relationship with the land (e.g., a landlord and a tenant).

A is correct. The facts state that the investor and the neighbor "expressly agreed that the neighbor would not assume and agree to pay the investor's debt to the partner." The neighbor, therefore, did not assume the mortgage, which means she has no personal liability with regard to mortgage payments. Even though the neighbor voluntarily made payments for a few months, she was under no contractual obligation to do so. And when the investor conveyed the tract of land to the neighbor without first obtaining written consent from the partner as required by the due-on-sale clause, this gave the partner the right to demand immediate payment of the entire outstanding mortgage balance from the investor (not the neighbor). However, the neighbor may still lose the property if the partner exercises the right to foreclose in the event that payments are not made by anyone.

B is incorrect. This answer reaches the correct answer with the wrong reasoning. Judgment should be for the neighbor, but not because she is not in privity of estate with the partner. The neighbor expressly did NOT assume the mortgage, which means privity is irrelevant between the neighbor and the partner. When a buyer purchases a property "subject to" a mortgage but does not "assume" the mortgage, she will not be personally liable for payments. Here, the neighbor took the property "subject to" the mortgage and did not assume, which means there was no shared relationship between the neighbor and the partner as to the land. The investor's failure to ensure that payments were made gives the partner the right to sue the investor and possibly foreclose, but not to hold the neighbor liable.

C is incorrect. The call of this question asks who judgment should be for in the suit by the partner against the neighbor, not the investor. The partner may have an immediate actionable demand against the investor for the full balance of the mortgage for violating the due-on-sale clause, but the issue here is whether the partner can recover from the neighbor. As explained above, the partner may not hold the neighbor liable because she did not assume the mortgage, and her rights are unaffected by the due-on-sale clause.

D is incorrect. This is a misapplication of the rules governing privity. As previously explained, the neighbor did not assume the mortgage that the investor had secured through his partner. Consequently, the neighbor was not in privity with the partner, so that issue is irrelevant. Note: The only privity that might exist would be between the neighbor and the investor, but that is not at issue.