

Spring 1993 PROPERTY II REVIEW  
Professor Mortland

For each question there is a list of the issues, the problems encountered on a significant number of papers, and a sample answer. In the answers, material in brackets indicates alternative analyses and conclusions.

The questions were graded on the basis of ten points, for a total of 40 points. The breakdown for grades is:

A - 33.5	1
B+ 32-33	9
B - 30-31.5	25
C+ 28-29.5	23
C - 26-27.5	17
D - 25-25.5	9

Question 1

Issues

1. Is there an express easement? What is the effect of the statute of frauds?
2. Is there an implied easement? Was there a use of the restaurant lot to serve the storage lot while the lots were in common ownership? Was title separated with the lease or with the transfer to Henry? Was the use reasonably necessary to use of the storage lot?
3. Did Tom give Olive a license to use the parking lot? If so, did the license become irrevocable?

Common Problems

1. Failure to recognize the separation of title issue. The lease to Tom gave him the exclusive right of possession. Was that a severance of the two lots for this purpose? See Schmidt v. Eger, casebook page 353.
2. Confusing access to land with access to structures. There is no evidence that Henry's lot was land locked. Access to the storage units was certainly reasonably necessary but not strictly necessary for purposes of an easement by necessity.
3. There are not enough facts here to raise a prescriptive easement issue. There is no indication of the length of the use other than the final four years by Henry and no statement of a statute of limitations. Those would have to be in evidence to raise this issue.

4. Some found a requirement for common ownership in the immediate past, or simultaneous conveyance of the two lots. Neither is required. An easement is implied if the conveyance of one of contiguous lots creates the need for an easement over the lot conveyed or over the lot granted for the benefit of the lot conveyed.

### Sample Answer

Judgment that Henry has an easement to use Tom's parking lot for access to the storage units on Henry's lot.

Henry does not have an express easement. An easement is an interest in land, required to be in writing, and there is no writing. However, the statute of frauds is not an absolute bar to finding an easement. Here the facts could support an easement by implication or an irrevocable license, which is in effect an easement.

The law will imply an easement based on use of the land by a common owner who later divides the land. If one part of land is used to serve another part in a way that would be an easement if the parts were separate (a quasi easement), and then a part is transferred to another, an easement will be found if the use is necessary to the enjoyment of the benefited part. We have that kind of use here. Olive owned both lots and constructed the storage units on one lot in a way that required use of the other lot to get into them. The use was apparent and permanent. That is a quasi easement. It is also reasonably necessary to the use of the lot with the storage units. The present use of that lot would become impossible without use of the parking lot for access. This clearly would be sufficient necessity for implication of a benefit. Implication of a burden requires a greater degree of necessity, often characterized as strict necessity, but this meets that test also. The courts do not require that the current use of the lot be abandoned when an easement will preserve it. This is in contrast to the strict necessity required to prove an easement by necessity with no prior use, where the usual requirement is that the lot be land locked.

The problem here comes to the question of when the two lots were severed. If it was with the transfer of the storage lot to Henry, the requirements for an implied easement are met. However, the restaurant lot was leased to Tom before the storage units were constructed on the other lot. Tom had the exclusive right of possession, making Olive's use of the parking lot a trespass unless it was with Tom's permission. It has been held that a lease is a severance for purposes of implied easement, and that holding makes sense because the use that leads to the easement is inconsistent with the rights of the lessee; it is not just an owner using her own property. We hold that severance occurred with the lease, so there was no common ownership when the use began. (While the general rule makes sense, the actions of the parties here indicate that they both considered that Olive was lawfully using her land. Tom was aware of this and did not object, and Henry should have the benefit of an implied easement.)

Henry does, however, have a right to continue using the parking lot for access. When Olive discussed the construction of the storage units and the need for use of the parking lot for access with Tom, he did not object. This was not express permission, but he knew that his lease gave him exclusive possession of the lot, and he certainly realized that she was acting with the understanding that it was all right with him; this amounts to permission. It is reinforced by his apparent acceptance of her stipulation that the later sale of the lot to him was based on continued availability of the parking lot. Because she built the storage units in reliance on use of the parking lot, the license became irrevocable. There is some disagreement about the concept of irrevocable license in cases where it is clear that only a license is intended, as the licensee should know that the permission may be withdrawn at any time. Here, however, the situation is more like an intention to grant an easement that falls because of the statute of frauds. There was no enforceable contract because there was no apparent consideration, but the intent seems to have been to provide a permanent use since the storage units would be useless without access from the parking lot. Therefore, Olive's reliance is justified and the license became irrevocable. This may have been a license, although permission and acquiescence are not the same, but it did not become irrevocable. Olive knew, or should have known, that she needed an easement to protect access to the units she was building, and she should have obtained an enforceable easement, rather than relying on doubtful permission. Tom may not have objected because he did not realize that he could exclude Olive from the land (as opposed to the building), or because it did not interfere with his use of the parking lot; whatever the reason, his silence does not equate with affirmative permission.

## QUESTION 2

### Issues

1. Should the contract be rescinded? Could Otto convey what the contract promised?
2. Did Agnes intentionally misrepresent the boundary to Paula? Did Paula rely to her detriment?
3. Has Agnes produced a ready, willing, and able buyer so as to be entitled to a commission? Has she forfeited it because her negligence caused Paula to rescind the contract?
4. Does the title insurance policy cover Otto's problem?

### Common Problems

1. Confusing a contract with a conveyance. A potential buyer does not check the title or have a survey before signing a contract (think of the expense and delay if you did that for every property you were interested in). That is what the period between the contract and the closing is for. Therefore, Paula is not at fault for

accepting the boundary information she was given.

2. Misconceiving the duty of an agent. A real estate agent does not have a duty to check records or conduct surveys before showing the property. Even the states that require some sort of inspection and disclosure to buyers apply that only to quality of the property.
3. Considering this as a description problem. There is no evidence that the description provided by the surveyor was wrong (practically, it had to be based on the descriptions in the record) or that there were any adverse claims to anything Otto owned. The evidence indicates only that the statement made by Agnes was wrong.
4. Considering this as a risk-of-loss issue. That applies to changes in the condition of the property during the contract period. Here, there was no change; the boundary simply was not where Paula was led to believe it was.
5. Stating that further evidence is required. You have the evidence that was before the court. If it is not enough to decide any issue, the party who has the burden of proof on that issue loses.

### Sample Answer

1. Paula v. Otto. Judgment for Paula.

Paula contracted to buy a piece of land based on the statement of the seller's agent that the boundary was 10 feet north of a fence. (We do not know whether that was the northern or the southern boundary, so we do not know whether she would be getting more or less than the amount of land she expected.) When a survey revealed that the boundary actually was 53 feet north of the fence, she offered to rescind and, when Otto refused, sued for rescission. She has a right to rescind if the land Otto owns is substantially different from the land she contracted for. Clearly, if the amount is less, she may rescind. We find that she has the right in either case because of the substantial difference. (If the amount is more, she is not damaged--in fact, is getting a windfall--and should be required to perform.) (I did not intend this ambiguity; I inadvertently omitted one word--northern--which would have made the amount less.) Otto may or may not be at fault; we do not know how Agnes determined the boundary she stated. It doesn't matter. He cannot convey what his contract promised. It is the same as if a record search revealed a title defect.

2. Paula v. Agnes. Judgment for Agnes.

Agnes was the agent for the seller and so has no fiduciary duty to Paula. While a few states have required agents to inspect the property and disclose defects to prospective purchasers, Paula has not asserted that. She has sued for misrepresentation, a tort action.

To recover for misrepresentation, Paula must prove that Agnes misrepresented the boundary, that she did so intentionally or with reckless disregard for the truth, expecting that Paula would rely on the representation, and that Paula did rely, to her detriment. Paula has produced no evidence that the misrepresentation was intentional. There is some evidence that it was with reckless disregard for the truth. Agnes knew that the boundary was determined with the aid of one who may or may not have been certain of its location, and it would have been better if she had told Paula of the facts so Paula would know of the uncertainty. However, while this may have been negligent, it does not rise to the level of reckless disregard for the truth. (Representation of the boundary location on the basis of this uncertain kind of evidence, if in fact she did use the relative's assistance, without disclosing the facts is reckless disregard for the truth.) Furthermore, Paula has not proved that she relied to her detriment. She did rely in signing the contract, but she has been able to rescind the contract, so she has not been damaged. (While she is not bound by the contract, she has incurred expenses, particularly the expense of the rescission suit. That was foreseeable detrimental reliance.)

### 3. Agnes v. Otto. Judgment for Otto.

The general rule is that a real estate broker earns the commission when she produces a ready, able, and willing buyer. Agnes did that when Paula signed the contract. Some jurisdictions require that the sale be completed, because the expectation of the parties is that the commission will come from the proceeds of the sale, unless the failure is caused by the seller. Here the contract was not performed because Otto was not able to convey what the contract promised. The agent should not lose a commission because of failure of title unless the agent has some responsibility for it. We have decided that Agnes did not intentionally misrepresent the boundary, and she followed Otto's direction for determining its location, so she should have the commission. [Otto should not have to prove a tort to show that Agnes, who does have a fiduciary duty to him, is not entitled to a commission. She did misrepresent the boundary, and there is enough evidence to show that she did so negligently, so she is at least partially responsible for the problem.]

### 4. Otto v. Title Insurer. Judgment for Insurer.

A title insurance policy covers defects in title to the property, but one of the standard exclusions is matters that can be discovered by a survey. The boundary issue here was a matter of locating the boundary on the ground from the record description a matter determined by a survey. There is no coverage.

## QUESTION 3

### Issues

1. Did Ann's contract give her an enforceable interest? Was it recordable? What is the effect of that answer?

2. Did Charles take priority over Ann? Is a judgment lien protected from unrecorded interests? Did he have notice of Ann's interest? Did he have notice of Bill's deed?

### Common Problems

1. Arguing different issues for each party. You cannot succeed by arguing for Ann that her contract interest has priority over Charles and arguing for Charles that he had no notice of Bill's deed. Both may be true, but both issues are important to each party's argument.
2. Related to this is ignoring issues that are difficult to argue. You can be sure that the other party will argue them and your client will lose by default if you have said nothing.
3. Arguing this as a question of delivery of the deed. The facts state that "Opal executed and delivered a deed conveying the property to Best Company." Executed means all formal requirements were satisfied and delivered means the deed became effective. While there was an understanding, which might be interpreted as a condition, there was no evidence that Opal intended anything but divesting herself of title. This was not an escrow delivery. Best Company was the grantee (you would have to construe the sentence in a strange way to find that Opal delivered the deed to Best but conveyed title to Ann); the grantee is not an escrow agent.
4. Starting analysis from the middle of the fact pattern. If you begin with the first transaction and determine its effect, then move to the second and decide how it is related, and then move through each subsequent transaction, you are more likely to reach a rational result.
5. Identifying the recording statute as race and ignoring the issue of whether a judgment creditor is a purchaser. A "subsequent innocent purchaser" does not indicate that good faith is irrelevant. Most courts have found that creditors are not protected (against prior unrecorded transactions) unless the statute specifically identifies creditors (as, for example, the statute in question 4).

### Sample Answer

1. Argument for Ann.

The trial court's judgment should be reversed and a decree entered quieting title in Ann.

When Ann contracted to buy the land from Opal she obtained an equitable title. Because the statute does not require recording of contracts, her interest is enforceable,

under common law, against all subsequent purchasers except one taking a legal interest without notice of Ann's interest. The conveyance to Best did not divest Ann of her equitable title because Best clearly knew of it, and in fact held title for her benefit. Charles did not know of Ann from the record because her interest was not recorded, but he had notice because she was in possession of the land when he obtained his lien. When possession is inconsistent with the record, a person taking an interest in the land will take subject to any prior interest that would be revealed by inquiring of the person in possession. Ann certainly would have informed him of her interest if he had inquired.

The deed to Bill also came before Charles acquired his lien. This clearly is required to be recorded, and it was not recorded until after Charles obtained and recorded the lien, but the statute protects only an innocent purchaser. Charles was not innocent because he had notice of the possession of both Ann and Bill and of what he would have found if he had inquired of them. Furthermore, the recording statute does not specifically protect judgment creditors, and the general rule is that they are not purchasers. This is the rule this court should follow, at least unless the judgment creditor can show that he relied on ownership of the property in extending credit or in deciding to sue, because the act is designed to protect those who rely on the record. There is no evidence of that here. Therefore Charles's lien is subordinate to Ann's equitable title.

## 2. Argument for Charles

The judgment should be affirmed.

The contract did give Ann an equitable title enforceable against all but a good faith purchaser, but Charles was a good faith purchaser. When he obtained and recorded his judgment the record showed title in Best Company. While it is true that Ann and Bill were in possession, Their possession was not inconsistent with the record because Best was the business owned by Bill's family. A corporation does not normally occupy residential property, so it would be normal to have a family member occupying it and Charles had no duty to inquire.

Charles had no notice of Bill's interest either. Bill's deed was not recorded when Charles obtained the lien, and Charles had no more duty to inquire of Ann and Bill under the statute than under the common law. He took in good faith.

Charles should be held to be a purchaser under the recording act. While most courts have required a specific reference for creditors to be protected, a judgment creditor has invested something in bringing the action and should be able to rely on the record at the time the lien is acquired and recorded. That would carry out the purpose of certainty in land titles by encouraging prompt recording of all interests.

## QUESTION 4

### Issues

1. Did Dan's Development Co. have notice of the restrictions not recorded in County B?
2. Did the plaintiffs have standing to enforce the restrictions? Were lot owners intended to have the right to enforce them against other lot owners?
3. Were the plaintiffs estopped to assert the restrictions because they did not object at the time of the rezoning hearings? Did Dan's Development detrimentally rely on their apparent disinterest? Did they have adequate notice of the rezoning proceedings?

### Common Problems

1. Failure to discuss a key issue, whether lot owners were intended to have the right to enforce the restrictions against other lot owners. We spent most of a class discussing the various views of the courts on the issue of who can enforce covenants when the instrument does not expressly address that issue. You should have discussed those views, chosen one, and applied it to the facts of this problem.
2. Stating conclusions without relating the law to the facts for example, that the agreement clearly provides that property owners can enforce the restrictions without identifying specific language (understandable, as there is none). Related to that is reaching conclusions on the basis of nonexistent facts. A court must decide on the record made by the parties. There was no evidence here, for example, of how, or whether, the subdivision was developed, so plaintiffs could not prove (and did not assert) that defendant had notice from looking at the land. Similarly, there was no evidence of changes in the neighborhood, and defendant did not assert that.
3. A significant number answered as if the Association were the plaintiff when the facts clearly stated that some owners of lots near the shopping center brought the action. The analysis of enforceability is different if the Association is plaintiff.
4. Several found that the recording act is not applicable because the agreement is not a conveyance of real property. It is treated as conveyance of a real property interest, but I would have recognized that finding because I may not have made that clear. However, they did not follow through and say what happens if the recording act does not apply, but treated the notice issue as if it did.

### Sample Answer

#### Judgment for Dan's Development Company

A restriction may be enforced against a successor to the original covenant only if

the successor had notice of the restriction. Normally, that notice is provided by recording the restriction, but here that was not done in B County until after Dan's put time and money into planning its development. The plaintiffs allege that Dan's nevertheless had notice because it had bought some of the lots in A County ten years ago and had seen the restrictions at that time. Since the document recorded in A County decided the entire subdivision, part of which was located in B County, that would be actual notice that the entire subdivision (that is the lots whose owners signed the agreement) was restricted. However, it is not reasonable to find that binding on Dan's now. It was concerned then with the lots it was buying and it should not be expected to remember ten years later that the restrictions also covered these lots. There is no evidence as to how Dan's intended to use those lots, and so how important the restrictions were, or whether it still owns them or kept them only a short time. A developer cannot be expected to keep in mind all the details of its past transactions. (Dan's certainly was concerned with restrictions when it bought the A County lots, and it knew that they were part of a two-county subdivision, so it is not unreasonable to expect that they would be aware that the lots they are concerned with now are part of the same restricted area.)

A second issue is whether these plaintiffs have standing to enforce the restriction. That depends on the intent at the time the agreement was made. The first place to look is the agreement itself, but the record does not indicate that it expressly stated who can enforce. The only thing we have that might bear on that issue is the fact that the Association has power to approve a business use; that could be construed to carry with it the power to prevent an unapproved use, but it says nothing about whether individual property owners can enforce the restriction.

Courts have disagreed about this issue. The most restrictive view holds that the owners can enforce only if the agreement expressly gives them that right because each property owner has the right to know, not only that her land is restricted, but also who can enforce that restriction. This has the effect of reducing the restraint on alienation because a restriction enforceable by one person is much easier to remove than one enforceable by many. This is a valid policy, but this court rejects the view that the intent can be expressed only in the instrument. This kind of restriction is intended to benefit the owners of the land by assuring them that their neighborhood will remain residential, so they should be able to enforce the restriction if it is clear from facts known to the burdened party that this was the intent. The view that the fact that the subdivision has been developed according to a common plan is enough need not be considered because there is no evidence of how this subdivision has been developed, or even if it has been developed. The decision must be based on what is in the record. The agreement here probably would not be enough, because it is open to the interpretation that only the Association may enforce the restriction, but that need not be decided because the defendant did not have notice of the agreement. There can be no right of enforcement based on an implied reciprocal servitude, because the restriction was not placed on the property by a common owner. [The only purpose of this kind of agreement is to benefit all of the lot owners and that purpose is best carried out by giving them the right to enforce. The agreement should be construed as giving them that right unless it specifically denies it; this agreement does

not deny it.]

Defendant alleges that the plaintiffs are estopped to assert the restriction. Estoppel is based on defendant's detrimental reliance on some act or, here, failure to act that the plaintiffs should have known it would rely on. There is some question as to whether estoppel can be based on presumed knowledge of the zoning proceedings based on publicity; if the plaintiffs did not in fact know of them there is no basis for their knowledge that defendant would rely on their failure to act. Even if they did know, they also believed that approval of the Association was an additional requirement and may have expected to object at that time. The defendant has the burden of proving estoppel, and the facts are not sufficient.