

Spring 1991 PROPERTY II EXAM REVIEW
Professor Mortland

The review for each question shows the issues I was looking for, a list of problems that occurred on enough papers to be significant, and sample answers. The bracketed material in the answers indicates alternate approaches; the results may vary depending on the combination of alternatives used. The answers are samples, not models. There is no one right way to answer a question. If you discussed the issues raised, recognized the rules of law potentially applicable and the effect of competing rules, recognized varying interpretations of the facts, applied the rules to the facts, and reached a result consistent with your discussion, you had a good answer.

QUESTION 1

Issues

1. Was there an easement for parking? Was it appurtenant?
2. Was the provision for forfeiture of the right of way if the buyer was not acceptable to Apex an invalid restraint on alienation? Was there a forfeiture?
3. What was the scope of the parking easement? Did the increased use exceed the scope? Would the unlimited use asserted by Carl exceed the scope?
4. What relief should Apex have?

Common Problems

1. Language is not always controlling; words of promise will create an easement (or maybe a license) if the promise is to allow use of land.
2. It does not matter in this case whether the forfeiture provision runs with the land because the breach, if any, would be by an original party. Carl would be bound because he had notice of the provision and so would not take free of it as a good faith purchaser, but the issue of enforcing it against a successor would arise only on a sale by Carl.
3. There were several aspects to the misuse issue, which most students did not deal with. Use by employees, sales people, and delivery people was clearly outside the scope of the easement and was misuse. Increased use by customers was within the scope, but raised the question of excessive burden. The allegation of an unlimited right carried that question to its limit.
4. There cannot be any kind of implied easement when there is an express easement for the same use. Failure or termination of the express easement does not undo the original transaction. There could be an easement by prescription if the easement is used after it fails or terminates.

5. Many students did not come to conclusions. It does not work to say that the court might find something; when the question asks you to decide the case, you are the court.

Sample Answers

Carl's present use of the parking lot may continue, but he will be enjoined from future use that is an undue burden on Apex's use. Apex must provide evidence to determine what use will be an undue burden.

The original transaction created an easement for parking. It was clearly a permission for BonTon to use Apex's parking lot granted by deed, and so satisfying the statute of frauds. There was nothing to indicate any time limit on it, the requirements for conveyance of an interest in land were satisfied, and the nature of the use indicates that the parties would intend it to be permanent, so it is an easement rather than a license. The provision that a future purchaser must be acceptable to Apex does not indicate a license. It is not a right to revoke at will, but a right to keep some control over the use of the easement through control over who is using the easement.

When Carl bought the land Apex was not asked to approve the sale. That does not automatically produce a forfeiture of the easement, even if it applies to the parking; the language clearly applies to the right of way only, but both easements are dealt with in the same paragraph and it could be argued that the provision applies to both. We do not need to decide that, however, because there was no forfeiture here in any case. The provision is a restraint on alienation and so should not be expanded beyond its clear scope; therefore, there may have been a forfeiture of the right of way, which is not an issue here, but not of the parking. The provision does not require any formal approval by Apex; it requires only that the purchaser be acceptable to Apex. As Apex has never objected to Carl as an owner, the inference is that Carl was acceptable. Certainly Apex should have the burden of showing that forfeiture occurred, and it has presented no evidence of that. Even if a forfeiture had occurred, Carl would almost certainly have an easement by prescription for the four spaces used during the entire period of his ownership.

The deed placed no limits on the number of spaces BonTon's customers could use. However, an easement cannot be used in a way that places an undue burden on the servient estate. Apex is using the parking lot for its customers also, and so use that makes the lot inadequate for Apex's customers would be an undue burden. Apex has the burden of showing where that line should be drawn. Apex has not objected to the increased use up to the time Carl obtained approval of his new expansion, so it is apparent that this use is not an undue burden. Use by persons other than customers of BonTon is outside the scope of the easement and so was a misuse, but Apex has not objected to that either. Clearly, then, Carl should be permitted to use up to 20 spaces, and it really should not matter to Apex whether they are used by customers or others. [Carl may use up to 20 spaces for customers, but others will not be permitted to park in Apex's lot. Failure to object does not amount to a waiver of the limitation, and it does not estop Apex because there is no evidence that Carl detrimentally relied.]

Carl obtained approval for additional expansion by a representation that he has an unlimited right to use of Apex's lot. This plainly is not true. He may have a right to more than the 20 spaces

he has been using, but the number cannot be determined on the present record. Apex must present evidence of its needs for parking so the court can fashion more specific relief. Ideally, the parties should negotiate a settlement that can then be incorporated into an order, but the court will make the decision if they cannot agree. Carl may then have to provide some other means of parking to satisfy the planning board and get final approval of his expansion.

QUESTION 2

Issues

1. Was Alice's contract required to be recorded, under the recording statute?
2. How are priorities determined when an interest is not required to be recorded?
3. Was Bob a good faith purchaser?
4. Does Bob have a cause of action for breach of title covenants?
5. Did Otto have a duty to disclose problems with the septic system? Was the defect latent? Did Otto know that it was a problem?

Common Problems

1. Failure to read and apply the recording act. It applies to "a deed of bargain and sale, a mortgage or other conveyance of land." A contract is not a deed or any other kind of conveyance. Therefore, the statute does not apply and common law priorities control. Under common law, first in time is first in right, except that an equitable interest (the contract) yields to a subsequent legal interest taken without notice. This issue comes straight from *Wayne Building and Loan v. Yarborough*.

2. Failure to evaluate the evidence. The fact that the trial court found that Bob had actual knowledge of Alice's contract is not controlling on appeal. The appellate court (that is the student writing the answer) needs to determine if that finding is justified by the evidence it was based on. This was a problem to a lesser extent in the septic tank issue. Did Otto know that there was a latent defect? The fact that it was repaired twice might give him that knowledge, or it might make him think the problem was solved.

Sample Answers

The judgment for Alice is affirmed (reversed); the judgment against Otto for breach of the title covenants is affirmed (reversed); and the summary Judgment to Otto on the damage claim is reversed and remanded for a trial (affirmed).

When Alice took the contract and paid the deposit, she obtained an equitable interest in the land based on having a specifically enforceable contract. The contract was not required to be recorded (and recording would not be record notice) because the statute covers only deeds, mortgages, and other conveyances. Therefore, under common law, her interest, being first in time, prevails over all but a subsequent taker without notice of a legal interest. Bob took a deed, which is a legal interest, but the trial court found that he took with notice. That finding cannot stand because the evidence the court relied upon does not support it. The fact that Otto discussed the contract with Bob after Bob accepted the deed clearly cannot be evidence of notice, as only notice obtained by the time the deed is accepted can deprive the grantee of the status of good faith

purchaser. That leaves the testimony that at some unspecified time Otto indicated doubt about his ability to convey. If this was before Bob accepted the deed, it would be enough to cause him to inquire further of Otto as to the reason for his doubt. Otto then would probably have told him of the contract with Alice. If so, he should then have inquired of her and would have learned of her interest. However, the evidence of the time of that conversation is too vague to find inquiry notice, much less actual notice. Furthermore, the decision is based on both pieces of evidence and we have no way of knowing if the court would have reached the same finding with only one. Alice prevails because Bob has not shown he is a good faith purchaser. [The case should be remanded to determine whether the court would reach the same result with only the indication of doubt of the right to convey. It is up to Bob to show that the discussion came too late to affect his purchase.]

Bob took a warranty deed and his title has failed. Therefore, he has a cause of action on the title covenants. Otto had a legal title when he delivered the deed to Bob, but he did not have the right to convey it because of his contract with Alice. Alice's action, successfully completed, has ousted Bob from the property, and so the covenants of warranty and of quiet enjoyment have been breached. The Judgment for Bob is affirmed. [Bob may have obtained a good title, so this judgment should be stayed until that issue is determined on remand. If the title is good, no covenant is breached and there is no cause of action. An unjustified claim does not breach a covenant of title.]

Many jurisdictions have imposed a warranty of habitability on a builder-seller of real property, but that would have no application to this case. Some states have required any seller of improved real property to disclose latent defects of which the seller is aware and that would probably influence the decision to buy or the price to offer. This jurisdiction has not adopted this view, but we find that it is reasonable. The person who knows of the defect and also knows that the proposed buyer does not should not be able to take advantage of that ignorance. Therefore, we adopt the rule that the seller must disclose known latent defects.

The defect here was latent. An ordinary inspection of the trailer would not disclose it unless the inspection happened to be made when there was a backup. Otto knew there was a problem, because he had needed two repairs, but he may not have known of the source of the problem, or that it was ongoing. There is not enough evidence to find liability as a matter of law, but there is enough doubt about the evidence to make summary judgment improper. While it is true that Bob did not get title to the property, he has incurred expense because of the defective septic system. If he can show that Otto concealed the defect and that he would not have purchased the property if he had known, he should be able to recover his costs. The issue must be remanded for a trial. (There is no reason to change the common law rule of caveat emptor. A buyer can have an inspection made that would probably disclose this problem, so there is no justification for putting this kind of burden on a seller who has no particular expertise. While there should be a duty to disclose, the evidence is insufficient to indicate that Otto had any intent to conceal a latent defect. There is no evidence that he realized the repairs did not correct the problem. Therefore, there is no cause of action and summary judgment was proper.)

QUESTION 3

Issues

1. Did the promises run with the land? Did the original parties intend that they run? Was there horizontal and vertical privity? Did they touch and concern the land?

2. Was the covenant extinguished by the marketable title act? What is the root of title for each party? Was the covenant preserved in or within 30 years after the root of title?

Common Problems

1. Stating conclusions without reasons. "There was horizontal and vertical privity," or "the promises touch and concern the land," by themselves, get you nothing.

2. Failure to discuss the issues. Some students decided both parts on the basis of a marketable title act (40 years for the first part). It does not seem reasonable to assume that the jurisdiction has a statute that fewer than a third of the states have, especially when the second part of the question specifically raises the issue, but even if you do, the issues of covenant running with the land are there and must be discussed.

3. Incorrect identification of the root of title in part 2. You go back 30 years from the present, to 1961, and take the last deed recorded before that--1949 for Dan and 1951 for Paula.

4. Discussing the marketable title act in terms of notice. The question is whether the act has extinguished an interest, not whether the parties have notice of it. Here the covenant was not specifically referred to in either deed that was a root of title, so the question was whether anything on record in the 30 years after that preserved it.

Sample Answers

1. Judgment affirmed in part and reversed in part.

The original covenant was in writing and indicated by, the words "successors and assigns," that the parties intended to run with the land. However, that intent is effective only if the promises are of the kind that can run with the land. They can run if there is the necessary privity, the promises touch and concern the land, and Dan had notice. The notice requirement is easily met, as the covenant appeared more than once in Dan's chain of title. Privity and touch and concern are more of a problem.

Most jurisdictions require both horizontal and vertical privity. Horizontal privity requires that there be a transfer of some estate in land between the original covenanting parties. There is no evidence of that here. There is also horizontal privity when both parties have an interest in the same land at the same time, as when there is an easement or a lessor-lessee relationship. There may have been an easement here, but the record does not show the nature of Dan's rights in the bridge, so there is no proof of that type of privity. A few states have eliminated the horizontal privity requirement, and there does not seem to be any good reason for it, but we are not inclined to change a long-standing rule of property. [The horizontal privity requirement accomplishes nothing, as knowledgeable parties can create the privity by two conveyances rather than one, so we are abolishing it.] Vertical privity is the succession of each party in the suit to the entire interest of one of the original parties. That clearly exists here, but by itself is not enough. Because the promise to pay taxes is enforceable in damages, and therefore the remedy at law is adequate,

the privity requirement applies and the judgment for damages is reversed.

The judgment requiring repair of the bridge is in equity; no privity is required in equity, so it will be affirmed if the promise touches and concerns the land. We find that it does. The promise requires Dan to do something on land (or real property in air space) that he is using, so it clearly touches and concerns that land. It is for the benefit of Paula's building, to prevent damage from water leaking through the bridge, so it touches and concerns her land. (It could be argued that the promise to pay taxes also concerns the land, because it arises out of the uses made of the two pieces of land. However, we do not need to decide that because it is still a promise to pay money, enforceable at law and so requiring privity.)

2. The result would be the same under a 30-year marketable title act. The act extinguishes most old interests-those prior to the root of title, which is the last title transaction of record for at least 30 years at the time title is being determined. We are determining title in 1991, 1961 is 30 years back, and the roots of title are 1951 for Paula and 1949 for Dan. Neither the 1951 deed nor anything within 30 years after it makes any reference at all to the covenant, so it is not preserved within her chain of title. Dan's 1949 deed refers to easements and restrictions of record, which is not specific enough to preserve the covenant, but the 1968 deed, less than 30 years after 1949, is specifically subject to the 1908 deed. That is enough to preserve the covenant. As it is preserved in Dan's chain of title, Paula may enforce it. The question might be more difficult if it were preserved in hers but not his, as that would subject him to a burden that had been extinguished, but we do not have to decide that question. [The covenant is extinguished. The 1968 deed would have had to set out the terms of the covenant to preserve it; a reference to the deed is not enough.]

QUESTION 4

Issues

1. Did placing the deed in the joint safe deposit box constitute delivery? Did it divest the grantor of control?

2. Did other evidence indicate that Opal intended that title be transferred to Donna?

3. Was evidence of lack of intent sufficient to rebut the presumption of delivery arising from recording of the deed?

Common Problems

Not reading the question carefully.

"The deed was placed in a joint safe deposit box" does not indicate who placed it.

"They closed the box" indicates that both acted to close it, and so Opal knew it. Not important to the issue, but important as an indication of carelessness, Donna did not occupy the house, her daughter did.

Using evidence selectively. You cannot make a successful argument by ignoring unfavorable

evidence because your opponent surely will not ignore it, aside from the ethical implications of misleading the court. You must convince the court that the evidence, taken together, supports your position.

3. Taking one piece of conflicting evidence as controlling. The fact that one witness stated that she thought the deed was not intended to be effective until death, when considered with all the other evidence, does not support a conditional delivery. Even if it did, it certainly is not an argument for Donna because almost all courts hold that a condition in a delivery to the grantee is ineffective, so you are back to the issue of immediate transfer.

4. Forgetting the presumption of delivery arising from the grantee's possession of the deed and from recording.

Forgetting that a trial court's findings of fact are controlling unless not supported by the evidence. That fact makes argument for Donna much less difficult. (Compare this with the other side of the same problem in question 2.)

6. Treating placing in a safe deposit box as an escrow. A box is not a person; there was no third person involved here. There was a delivery directly to the grantee or no delivery.

Sample Answer

1. For the estate

The judgment should be reversed because the deed was never delivered and so never became effective.

A deed is not effective until it is delivered. While manual transfer is not essential to delivery, it is essential to prove that the grantor intended that the deed be a presently effective conveyance. That did not happen here.

Placing the deed in a safe deposit box accessible to the grantor and the grantee is not a delivery. While it does give the grantee access to the deed, and so the means of physically controlling it, the grantee has not given up control and so other evidence of intent to make it effective is necessary.

Donna did obtain possession of the deed when the box was closed, according to her testimony. She had it long enough to record it, at any rate. That possession and recording would raise a presumption of delivery, but the presumption is easily rebutted. There is no evidence that Opal knew the deed was recorded. She presumably did know that Donna took it when they closed the box, but she did not act as if the title had been transferred to Donna. She acted as any owner of property would -- maintaining it, paying taxes and insurance, and, most important, claiming ownership to obtain a tax exemption. We should not assume fraudulently.

Donna's actions were also inconsistent with a belief that she had title. When her daughter and her friends occupied the property, they paid rent to Opal, not Donna.

The testimony of other witnesses is conflicting and in some cases equivocal, and does not refute the strong implications of the way the parties treated the property.

2. For Donna

The judgment should be affirmed. The deed was delivered and Donna has title.

The fact that the deed was recorded raises a presumption that it was delivered. Possession by the grantee raises the same presumption, and could also be applicable here also. Evidence of possession of the deed is strong because it was recorded, but the evidence was conflicting. However, the fact of recording before

Opal's death is unchallenged. The evidence is conflicting, but it does not rebut the presumption, particularly in light of the principle that the trial court's findings of fact control unless they are unsupported by the evidence.

Delivery to the safe deposit box, by itself, might not be an adequate indication of intent to make the deed effective, although in the family relationship it may be some evidence. That is not all that happened, however. When the box was closed by both parties, it can be presumed that they knew what happened to the contents, and specifically that Opal knew that Donna took the deed. Since there is no evidence that she objected, there is an inference that she intended that Donna have it, that the property belonged to Donna.

Opal's actions were those of an owner of property, but the trial court apparently did not believe that they indicated a belief of continuing ownership. Again considering the family situation, the court could have considered that the parties intended a transfer of the title without a transfer of possession and the responsibilities that go with possession.

The evidence of other witnesses is conflicting, but none of it demands a finding of no delivery. The close family relationship does not negate an intent that Donna have this property, particularly in light of the testimony that Opal said she was doing it because she had already helped her other daughter financially. The testimony that Opal said Donna would handle things to provide for another daughter's children is not inconsistent with these conveyances; we do not know what property Opal had, nor do we know how Donna intends to use this property. The belief of one witness that the deeds were intended to be effective at death is just her belief and not controlling. In short, the trial court's verdict is fully supported by the evidence and should be affirmed.