

1992 PROPERTY II REVIEW
Professor Mortland

Question 1

Issues

1. Did Paul's adverse possession of the strip begin with his sodding in 1969 or the fence in 1973?
2. Was Paul's possession hostile?
3. Did Paul satisfy the other requirements for title by adverse possession?
4. Did Olive breach any of the covenants in the warranty deed?
5. What compensation may David get from Olive?

Common Problems

Adverse Possession

1. Lack of title is not an encumbrance; it breaches the covenant of seisin and, after ouster, the covenants of quiet enjoyment and warranty.
2. Paul asked for title by adverse possession, so he could not raise easement by prescription on appeal. Even if he could, this is not an easement case. Paul was in possession, excluding Olive, then David.
3. Notice to a purchaser is not an issue in an adverse possession case. It makes no difference whether the purchaser has notice; adverse possession is proved for the statutory period the possessor has title; if it is not he has no title.
4. A warranty deed does not guarantee marketable title. You must prove breach of a specific covenant. This title was not marketable because of the encroachment, but if David wins the suit against Paul, no breach of a covenant has been proved. You might argue, as a few did, that the existence of the encroachment is an encumbrance because it will require a law suit; that is worth credit, although I know of no authority for it. The future covenants guarantee there will be no interference with possession because of a superior title; if Paul fails, there is no superior title.
5. Present covenants are breached when made, if at all, but they are not extinguished. If no action could be brought later for a breach the covenants would be a nullity.
6. Again, notice is not an issue. The covenants in a warranty deed are unconditional; it makes no difference whether either or both parties knew of the problem. If it did, the existence of a

fence is not notice of adverse possession. A fence is no more notice than any other apparent boundary line. The logical assumption is that it marks the boundary.

7. If there is no title to part of the land, the buyer has the right to damages for the value of the missing part. It does not matter that he accepted the deed on the basis of the apparent boundary and so has "got what he expected." The covenants assure that the seller has what the deed purports to convey. The buyer also has the right to recover the cost of a direct attack on the title (Paul's action was a direct attack) if he has notified the seller of the suit (David did). He can get either of these only if the attack is successful; if not, no breach has occurred. Some found liability after a decision for David against Paul on the basis of the covenant for further assurances; that is an argument worth credit although, again, I know of no supporting authority.

Sample Answers

The verdict for David is reversed (affirmed).

To prove a title by adverse possession, Paul must first prove that he had possession of the land and that his possession was hostile, or adverse, to Olive's title. From the time he sodded the strip in 1969 he had possession of the land. The continued existence and maintenance of the grass is possession, not intermittent trespasses. His possession was hostile because he was claiming it as part of his property. There is no evidence of permission from Olive; to the contrary, she apparently did not know that his lawn was encroaching on her property. A few courts would hold that, because Paul apparently was not aware that he was encroaching, his possession was not hostile--i.e., that "hostile" means an intentional taking of something not his. This court rejects that view. When he took possession, Olive had a cause of action and the statute of limitations started to run.

Next, Paul must prove that his possession was open and clearly observable by those in the neighborhood. Putting and maintaining grass are open acts of possession. The trial court apparently found that this was not sufficiently open, but it was in error. (The trial court was right. Adding ten feet of sod to an existing lawn is not sufficient to give notice of an adverse possession.)

Finally, Paul must prove that his possession was exclusive and continuous. There is no evidence that Olive ever used the strip, so his possession was exclusive of her. He excluded the rest of the world in the same way as any land owner who maintains a lawn without a fence. After he built the fence, there was no question that his possession was exclusive. There is no evidence of any break in his possession, so that requirement is met. [Before the fence was built, there was no exclusion of Olive. Lack of evidence that she used the strip is not enough to meet his burden of proof in the face of the trial court holding.]

Verdict against Olive affirmed (reversed) and case remanded for a determination of the value of the strip [and judgment entered for Olive].

(If Paul prevailed) Olive gave David a warranty deed, which promised that she had title and that David's possession would not be disturbed by one with a superior title. When Paul proved title by adverse possession it became clear that both promises were breached. She in fact did not have title to the strip, and David was ousted by being unable to take possession of the

strip because Paul had acquired title by adverse possession. For these breaches he may recover the value of the land he did not obtain, determined by subtracting the value of the lot without the strip from the value with it. He may also cover the costs of defending Paul's suit. That was a direct attack on the title, making costs of defending a part of his damages, and he gave Olive notice of the suit, and so an opportunity to defend it, making her liable for the costs.

(If David prevailed) Because David prevailed in Paul's action, there was no breach of a title covenant. Olive did have title, and, while he was ousted from possession, it was not by a superior title and he has been put back into possession. [While there is no breach of the covenants based on title, it is arguable that the covenant for further assurances required Olive to defend the quiet title action. There is no authority, and this covenant has been litigated rarely, but that would be a logical interpretation of it. I find that David may recover the costs of defense under this covenant. Alternatively, the encroachment might be considered an encumbrance because of the need for litigation to resolve the matter. If so, that would be a breach of the covenant against encumbrances.]

Question 2

Issues

1. Did the description in Best's mortgage convey anything? Was it an error that could be corrected by extrinsic evidence? If so, should subsequent purchasers from Otto be aware that this mortgage might affect the land they are buying?
2. Did Commercial Credit get anything in its mortgage from Otto?
3. Is there any reason for priorities to be other than in order of recording?

Common Problems

1. The recording statute is notice, not race notice. It makes an unrecorded instrument ineffective against a subsequent good faith purchaser and says nothing about the subsequent purchaser recording.
2. It is all right to discuss the effect of a tract index, but not to ignore the effect of the grantor-grantee index, which is by far the most common.
3. When interests are required to be recorded, as all the interests here are, they are never controlled by common-law priorities. If an interest does not satisfy the requirements of the statute, it is not protected by the statute.
4. When there is a problem with the description in a recorded instrument, the courts will try to make it effective if there is any way to determine the intent of the parties by extrinsic evidence. Here, looking at the Best mortgage and comparing the description to that of the land Otto owns, it is pretty clear that the problem is a typographical error. You should not just say the description is vague and so ineffective without trying to clear it up.

Sample Answers

Allright Bank has first priority for \$5,000; Best Finance Company has second priority for \$8,000; and Carol has third priority for \$27,000. [Carol has second priority and Best Finance has third priority.]

Allright took the first mortgage and recorded it promptly, giving notice of its interest to all subsequent parties. It has priority and gets its outstanding balance of \$5,000.

Best took the second mortgage, but there is a problem. The description differed from that in Otto's deed by changing SE 1/4 to SE 1/2. This conveys nothing. There is no southeast half of a section. Even if you divided the section diagonally from southwest to northeast (which is not done), there would be no northwest quarter of the resulting triangle. When this is compared to Otto's description, it is apparent that the 1/2 is an error and was intended to be 1/4, thus mortgaging the land that Otto owns. That correction is effective between the parties. It should also be effective notice to subsequent parties. Anyone searching Otto's title will find the mortgage and check the description to see if it affects the land she is buying similarly, and the impossibility of the description, should cause that person to inquire. Inquiry would reveal that the mortgage in fact does cover the same land. (It may be acceptable to correct the description as between the original parties, but it is not reasonable to expect a title searcher to examine closely a description that does not seem to cover the land he is searching. Therefore, the mortgage is not notice to subsequent parties. Best is at the bottom of the priority list.)

When Carol took her deed she was charged with notice of the two recorded mortgages, and so took subject to them. She therefore has third priority and gets what is left, or \$27,000. [Carol gets \$35,000. Because Carol did not have notice of Best, she had title unencumbered by its interest and takes the remainder of the sale proceeds.]

Commercial Credit has no interest. When it took a mortgage from Otto, it was on notice from Carol's recording that she, not Otto, owned the land. It cannot get a valid mortgage on land not owned by the mortgagor.

Question 3

Issues

1. Does Peg have an easement implied from prior use?
2. Does Peg have an easement by prescription?
3. How should Peg proceed?

Common Problems

1. You don't get any credit by saying only that a particular requirement is met, for example, that there is reasonable necessity (to support an easement implied from prior use). You don't get much more by saying that the driveway is necessary to reach Peg's garage. The question is whether a driveway on her lot is practical, and, if so, whether that negates the probable intent to grant an easement. Another example of a conclusion without reasons is the hostility requirement for easement by prescription.

2. Strict necessity means landlocked. The street that the driveway on lot 2 reaches presumably would also be accessible to lot 1. At least, you cannot say there is strict necessity without discussing that.
3. In the context of easement by implication, continuous use means the kind of use during common ownership that indicates intent to transfer an easement. The purpose is to find the presumed, though unexpressed, intent of the parties. Use after separation of title would be relevant only as one indication of necessity.
4. When you are advising a client, you need to explore all possibilities. Here there might be an easement by implication or an easement by prescription. You also need to advise her what she might do, and the first option should not be a law suit.

Sample Answer

You probably do have an enforceable right to continue using the driveway on lot 2. There are two ways in which you may have obtained an easement in that driveway.

First, you probably have an easement implied from prior use. Olga originally owned two lots, and she used the driveway to reach the garage on your lot. The use was apparent and was in the nature of an easement (called a quasi easement). One would expect that when she conveyed lot 1 to Alan she would have included an express easement in the driveway, but she did not. However, the courts will imply an easement in this situation; it appears that the parties would have intended an easement if they had thought about it. That presumed intent is determined by the existence of the use and its reasonable necessity to beneficial use of the lot conveyed. Reasonable necessity has no fixed meaning; the court looks at the circumstances. Here, it appears that you could put a driveway on your own land, but use of the existing driveway is a valuable adjunct to your lot. Most courts probably would find a reasonable necessity here, particularly when it would be an implied grant, but this is a risk in litigation. You must also show that the owners of lot 2 took title with notice of the easement, but that is not really a problem because the use was obvious and should have caused them to inquire.

If an implied easement fails, you probably could prove an easement by prescription. That requires that the driveway has been used adversely, openly, and continuously for a long enough period that an action to stop the use is barred by the statute of limitations. The longest statute of limitations is 21 years, so the use here has clearly existed long enough. It is an open use, observable to all, and has been continuous in that it has been used the way any driveway would be used. We don't know at this time whether it was used by one person for that time, but we can put together the use of all owners unless there was a break. The questionable element is adverse, or hostile, use. In most states all that is required is that the use not be with the permission of the owner, and there is a presumption that it is without permission. It is unlikely that there has been any specific permission, as it seems that all parties thought there was a right, but this is something to be explored. It is also possible that the court will presume that there was permission, and you will have to prove that there was not, or maybe even that the users knew they had no right and so, were claiming with a hostile intent.

Our first step should be to inform Dan of the situation and the probability that he would lose in litigation. We can hope that he will be willing to grant you the right that you probably

have. If you get a deed from him, you can record it and will have a secure right to the easement. If he refuses to negotiate, you will have to weight the costs and risks of litigation against the cost of putting a new driveway on your lot. In this case, the cost of the driveway will probably be less.

Question 4

Issues

1. Did the covenants clearly prohibit a business conducted in a single-family dwelling? Were they clear as to the materials and design of a garage when the house used two kinds of material?
2. Did the evidence support termination of the single-family dwelling restriction by a change in the neighborhood?
3. Was Peter estopped to enjoin Dorothy's business by his car restoration activities?
4. Did Peter waive nonconforming garages by failing to object to an earlier nonconforming garage?

Common Problems

1. Too many students gave me a treatise on covenants running with the land. Dorothy raised four specific defenses, none of which challenged original validity of the covenants or enforceability by and against other lot owners. Most of you were not hurt by this (except as I was irritated at having to wade through it), but some then failed to discuss the defenses that were raised, or discussed them only superficially.
2. There was a superficial analysis, or no analysis at all, of the vagueness issue. It doesn't do to say simply that the covenants are clear. What do they specifically restrict? (See Issue 1 above.)
3. Some of you did not read the question very carefully. This was indicated by discussions of estoppel as applied to the garage (where Dorothy had alleged waiver) and by discussing the tax preparer in connection with estoppel of Peter rather than with change in the neighborhood; Peter was not preparing tax returns, nor was someone else doing it in Peter's house. (Just as a matter of curiosity, why did so many change my "estoppel" to "clean hands" and my "waiver" to "acquiescence"?)

Sample Answers

[The judgment is reversed as to the business and affirmed as to the garage.] [The judgment is affirmed as to the business and reversed as to the garage.] [The judgment is affirmed.]

Dorothy alleges first that the covenants are too vague to enforce. They are clear on their face, but as applied to these facts there are some problems. The restriction to one single-family residence clearly prohibits a commercial building, but it does not clearly prohibit a business conducted in a single-family house that is simultaneously used as a residence. There are businesses that could be conducted from the home that would have no effect on the residential

character of the neighborhood a business conducted primarily by telephone, for example. The tax preparation that one resident has been doing may also be that kind of business. A beauty shop, on the other hand, generates traffic and people coming and going, and is more obviously commercial. We believe that the purpose of this restriction was to maintain the residential character of the neighborhood, and the beauty shop should be enjoined. Her allegation that the restriction is unenforceable because of changes in the neighborhood simply is not supported by the evidence. The only changes she produced were the tax preparer and Peter's car restoration. Whatever the effect of these, two businesses are not enough to make the covenant of no value. [The restriction does not clearly prohibit this kind of business, and it should be construed strictly against limiting the use of land.]

Dorothy alleges that Peter is estopped to enforce this restriction because he is also carrying on a business. He testified that it was a hobby, not a business, although his son had, in the past, received some payment for painting cars. Dorothy has not refuted this testimony. The occasional receipt of money for some activity does not make-a business. This does not appear to have the same kind of effect on the neighborhood as the beauty shop; particularly there is no evidence of a lot of coming and going.

As to the garage, the restrictions again are not totally clear. When the house is brick and aluminum, must the garage be of both, of the dominant material (brick), or of either? Is that clarified by the requirement that it be of the same design? The trial court did not give reasons for its Judgment, but if it can be supported on any ground it should be affirmed. The court may have found that this garage did not clearly violate the restriction, and that is supportable.

The restriction to two automobiles capacity, however, is not ambiguous as applied to these facts. That may not be precise, but it is clear that no garage that holds all the vehicles in this garage is close to fitting the requirement. Here Dorothy alleges that Peter has waived the requirement because he has not objected to another large garage that is also near his residence. Waiver is a voluntary relinquishment of a right. Peter's failure to object to the first garage might have been a waiver of any similar garage as well as that specific one, but the earlier garage is not similar. We don't know how large it was, but we do know it was farther from his lot and, more important, was on a lower level and less visible, therefore probably making it less objectionable. Dorothy's garage is very close in fact, much closer to Peter's house than it is to hers. This makes it more objectionable and he has not given up his right to object.