PROPERTY II EXAM REVIEW

Spring 1994

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 50 points. The breakdown of grades is:

A - 42.5 and up	9
B+ - 40-42	13
B - 37.5-39.5	30
C+ - 35-37	16
C - 32.5-34.5	10
D - 30-32	4
E - 29.5 and below	1

QUESTION 1

Issues

- 1.Does the absence of a witness affect validity of the contract?
- 2.Did David have notice of the contract? Did the record of the certificates of transfer give him record notice? Was there anything outside the record that should have caused him to inquire? 3.Did David have to record to have protection of the recording act?

Common Problems

- 1.A large number of students identified the recording act as race-notice. There is nothing in it that can be construed as requiring that a subsequent purchaser record first, so it is a notice statute. In fact, this is the Iowa statute that is one example of a notice statute on page 486 of the casebook. 2.About one-third of the students did not recognize that the certificates of transfer were wild recordings. They clearly would constitute inquiry notice to anyone who saw them, but a person searching under Hal and Wanda would not find them because Sally's contract was not recorded. 3.Not many students discussed recordability of the contract. This statute is broad and requires recording of any interest affecting real estate; an enforceable contract clearly does affect real estate, so it needed to be recorded. You may have seen this as obvious, but you should have discussed it.
- 4.Some students said that Henry and Donna were protected by the shelter rule. (This is not a term we used, but we did discuss the concept that one taking from a good faith purchaser takes the title her seller has even if she had notice of a defect.) This rule does not apply to Henry and Donna because they are not seeking protection of the recording act. Good faith is irrelevant because at the time they took there was no competing transaction. It applies to one claiming under a later chain of title and asserting protection against an unrecorded instrument in the earlier chain.

 5. There were a few other items that did not affect grades but indicated some misunderstanding or poor use of terminology. Several referred to the contract vendor as "holding the deed" until the

entire price is paid. The deed probably does not exist at the time of the contract (although many contracts will require execution of a deed to be held in escrow), and it is risky to have an executed deed that will not be delivered for a long time. The misconception seems to be that there is one deed that represents the land, but that is not the case. A new deed is executed for each transfer; the deed is the vehicle of that transfer and is not used again.

Several referred to recording as actual notice. It is if it is in fact seen, but we refer to it as constructive notice, or record notice, because a person is charged with what would be found whether or not he searches. Actual notice is something the person knows. Inquiry notice then comes from knowledge of something that should cause further inquiry; it may come from something found in the record or something seen on the land, or anything else that should cause suspicion and provide a source of inquiry.

Sample Answer

Judgment for David (Donna).

David can make two arguments to support his case. First, Sally's contract was defective because there was only one witness while the statute requires two. However, this is not a good argument in this case. The requirement of witnesses is a formal requirement not common in a statute of frauds. There is a formal contract here, and no one is arguing that the terms are not clear or that this was not the intent of the parties, and the lack of one witness should not totally invalidate the contract. It is one that could be corrected by obtaining an additional witness. In the meantime the parties have acted as if the contract is wholly valid, so it should be enforceable on the basis of part performance.

There is no evidence that Sally or her successors defaulted on the contract and Hal and Wanda have taken no steps to assert forfeiture, so it seems apparent that payments have been made and it is clear that Sally took possession. That should be enough part performance to make it enforceable. The burden should be on Donna to show that the contract is enforceable, and there simply is not enough evidence. We cannot assume payments that are not asserted.

David's second argument is that he bought the land without any notice of other rights and so is protected by the recording act. This is established by the record. The statute protects from an unrecorded instrument a subsequent purchaser for a valuable consideration without notice. The contract transfers an interest in land, as it is specifically enforceable, so it is required to be recorded. Sally did not record. The later transfers at death were recorded through certificates of transfer, and the one from Sally to Henry specifically mentioned the contract, but these were wild recordings so long as Sally's contract was not recorded. David, if he searched the title of Hal and Wanda, would find no previous conveyance from them. Thus, he had no notice from the record. The fact that the property was sold to him creates a presumption that he paid a valuable consideration, bringing him within the protection of the act. [David has the duty to prove both elements required for protection, and simply identifying the transaction as a sale is not enough.]

There is no evidence that David knew about the contract. That would have had to come from someone telling him of it, and there is no such allegation. Donna was not living on the land,

and there is no evidence of anything else that should have caused a reasonable person to inquire, so he had no inquiry notice. Therefore, he qualifies as a good faith purchaser.

OUESTION 2

Issues

Was the deed delivered?

- a. Did Mike intend that it become immediately effective?
- b. Did Mike give up control?

Common Problems

1.A significant number of students missed the issue and based their answers on other perceived issues. The question might have been clearer with a few more facts, but, on the other hand, I gave you the issue: "Mike's estate asserted that the deed was not delivered and so did not become effective." That was the only basis asserted, so delivery was the only issue.

Some discussed severance of a joint tenancy; that could have been an issue, but it wasn't because it wasn't raised, and it was not part of this semester's work.

Some discussed equitable conversion, which has no application to these facts. It applies to a contract in the time before conveyance to determine who has the risk of loss and to determine whether the interest of a deceased party is realty or personalty; there was no contract here.

Some discussed warranties, which have no application to these facts. If the deed was not delivered there are no warranties because it never became effective. If it was delivered there is no breach of warranty. In any case, a warranty applies only to defects existing at the time of conveyance, and if this were a defect it would be caused by the conveyance.

Finally, some discussed delivery of the sale deed to the third parties. In some cases, this was another example of thinking there is one deed representing the title; these students were saying that the deed wasn't delivered because it was in Sue's safe. Others apparently thought on some other grounds that the sale deed was the one at issue. It was not. That was a valid conveyance as far as the purchasers were concerned because there was no evidence they had any notice of any interest Sue may have had. The estate was not challenging that conveyance; it was seeking the proceeds, not the land. The deed in question was the joint tenancy deed, and all the evidence went to the question of delivery of that deed.

2.Many students did not see the significance of the brother's testimony that Mike instructed Sue not to record until after he died. Some were arguing for Sue that she was merely carrying out his instructions, or that it indicated that he really intended her to, have the land after he died; some were saying for Mike's estate that it really wasn't significant; and several simply ignored it. In fact, it is an indication that he intended an interest that would be effective at his death, but that cannot

be accomplished by a joint tenancy deed without using an escrow (and if it is effective it negates the joint tenancy terms of the deed). It is a strong argument for Mike's estate and a factor that must be overcome in Sue's argument.

- 3.Several argued that the terms of the deed showed an intent that Sue have a share and supported delivery. That argument could apply to any deed. The grantor intends what the deed says, but delivery determines when that intent is effective.
- 4.Several students argued only the favorable parts of the evidence for each party. That won't work. Your opponent won't ignore that evidence, and if you don't deal with it the opposing argument is all the court will have.
- 5.Several students assumed (maybe unconsciously) facts that were not stated. There was no evidence as to who opened the joint bank account or who put the deed into Sue's safe (or when it was put there), so you can't base an argument on Mike doing those things.

This should be distinguished from looking for alternative reasons for an action to show that it doesn't necessarily mean what your opponent wants to argue. For example, there could be several reasons for Mike to convey the land and take the note and mortgage in his own name; it might be simply because the joint tenancy deed had not been recorded and he didn't want to complicate the transaction, because it is simpler for payment to be made to one person, because he handles financial matters for Sue, or because he owns the whole since he has not yet delivered the deed to Sue. You can't use any of those as evidence of his specific intent, but you can use the existence of the possibilities to show lack of evidence of motivation.

Sample Answer

1. Argument for Sue.

The judgment should be reversed because Mike did deliver the deed to Sue.

A deed is not effective until it is delivered, but delivery does not always mean physically handing the deed to the grantee. There is no evidence of that here, but there is strong evidence that Mike intended that the deed be presently effective, and that is what constitutes delivery.

The deed was found in Sue's safe after Mike's death, so it was in her possession. Possession by the guarantee raises a presumption of delivery. That presumption is weakened in this case by the fact that Mike had access to her safe, but there is no evidence that he used it at any time after the deed was placed there. There should still be a presumption, even if it is weak.

The fact that he sold title to the whole and took the note and mortgage in his name only, standing alone, would certainly rebut the presumption, but it does not stand alone. The evidence clearly indicates that he deposited all payments on the note into a joint bank account with his sister. That is a strong indication that he considered the proceeds to be partly hers, and so that he had transferred a cotenancy interest to her.

The testimony of their brother, that Mike instructed Sue not to record the mortgage until he died, indicates that the deed probably was handed to Sue, which could be a delivery, but it also indicates a condition on that delivery. A condition is ineffective unless delivery is in escrow and the condition is on release from escrow. That was not the case here. The question, then, is whether this indicated lack of intent to make the transfer presently effective. In light of the other evidence of present intent, and the fact that this would be inconsistent with the terms of the deed that gives a present interest along with survivorship, we strongly urge that it does not overcome other evidence of present intent.

2. Argument for Mike's Estate

The judgment should be affirmed because the deed was never delivered.

A deed is effective only when it is delivered. Most deeds are delivered by physically handing them to the grantees, but in any case where delivery is challenged the real question is whether the grantor intended that the deed become effective. We argue that Mike never intended this deed to become effective, at least during his lifetime. If he intended that it become effective at his death, he chose the wrong vehicle; he needs a will to accomplish that.

While the deed was found in Sue's safe after Mike's death, there is no evidence as to how or when it was placed there. It could have been Mike or Sue who did it, and if it was Sue, she could have done it after Mike's death. Furthermore, Mike had access to Sue's safe, so even if he put the deed there he did not give up control. It is of no importance whether he ever did enter the safe; he could, and that gave him continuing control of the deed. This total lack of evidence of Mike's intentional placement of the deed, together with his continuing access, fully rebuts any presumption of delivery.

Mike's sale of the property is a strong indication of his belief that he owns the whole, and so of lack of delivery. While there may be other reasons for his action, the most likely one is his sole ownership of the property. His deposit of the proceeds of the sale into their joint account could indicate that he believed Sue had an interest, but it could also be simply that they have used the account as the depository for their funds. There is a difference between depositing money in a joint account, from which it may be withdrawn at any time, knowing that the survivor will own whatever is in the account at the death of one, and transferring an irrevocable interest in realty. This is some evidence of intent to deliver the deed, but not enough to overcome the strong negative evidence.

Finally, Mike's instruction to Sue not to record the deed until he died, which was not

challenged, is a strong indication that he intended the deed to be operative only at his death. He cannot accomplish that by this deed and it negates any intent to make it effective during his lifetime.

The judgment of the trial court is supported by substantial evidence and should be affirmed.

QUESTION 3

Issues

- 1. Did Alice obtain an easement by prescription?
- a. Was her possession hostile (adverse)? What presumptions do courts use? Who has the burden of proof?
- b. Is exclusive use required? If so, how do the courts interpret it? Was Alice's use exclusive?
- 2. Did Alice have a cause of action for the flooding of the road? What are the rules used by the courts? How do they apply to these facts?
- 3. Was Alice estopped to require removal of the house? Did Bill justifiably rely on her failure to object while he continued building? Or was he on notice by their earlier conversations?

Common Problems

- 1.Many students stated that hostile and exclusive use are not required for an easement by prescription, but are confined to adverse possession. "Hostile" is just another way of saying "adverse," and most did discuss that requirement. Many courts do not state exclusive as a requirement, but others do; see Plettner v. Sullivan, page 650 of the casebook. Those that do, for the most part, do not require that the owner be excluded because the right is to use, not to possess, but rather require that the use not depend on some other right or that it not be used by the public. Many students did discuss exclusion of the public even when they said exclusion was not required, but a number said nothing more after saying it is not required.
- 2.In discussing hostility, many students said Bill did not give permission, and some said he did give permission. Neither is supported by the evidence; it is simply silent as to permission. That is important, because the courts use different presumptions in this situation, and the presumption chosen will determine the outcome on this issue. Some did say that Bill knew of the use (not clear, but probable), and so he obviously permitted it. That is going too far; that would eliminate most easements by prescription.
- 3.A few students stated in a sentence or two that there was no easement by prescription, and then proceeded to discuss other methods that are totally unsupported by facts. It should be obvious that the method I stated as asserted is the one I want discussed, and that I will give no credit for discussing other methods instead. Some other students discussed one or more other

ways of obtaining an easement along with prescription. I did not penalize for this, but the result in many cases was failure to discuss thoroughly the prescription that was the primary issue.

4.Some students stated as facts things that were not supported by the record, often in discussing other methods, but sometimes in discussing prescription. For example, some stated that the easement was necessary for Alice to reach her land; the facts do not support that. Some used it to justify easement by necessity, forgetting the requirement of separation of a common ownership. Some said a prescriptive easement would be terminated because it was no longer necessary since she has access by another road; necessity is irrelevant to prescription, and the fact that two former users now use another road says nothing about whether Alice has access to that road.

Sample Answer

Alice is claiming an easement by prescription across Bill's land; Bill argues that she has not proved that her use was either hostile or exclusive. As he has not challenged any of the other requirements, they are taken as proved and discussion is confined to these two.

While courts differ to some extent about the meaning of hostility, most simply require that the use be adverse to the rights of the land-owner, giving him a cause of action. That test makes sense, because a prescriptive easement is the result of the statute of limitations barring a cause of action. The use here was hostile in that sense unless it was permissive. There is more difference among courts on this issue, particularly in the situation where there is no direct evidence of permission or lack of it, as in this case. Some courts presume that use is hostile; that places the burden on the land owner to prove that permission was given. Bill has not done that, so under this view the use is hostile. Others presume that the use is permissive unless the user proves that it is not. Alice has not proved that, so she would not satisfy the hostile requirement under this view. A few will presume the use is permissive if the land owner knew of it, or is situated so that he would know of it if he paid attention, and hostile if that is not the case. Since the facts do not clearly indicate which of these patterns applies, neither presumption would apply and Alice, who has the overall burden of proving her case, would lose. The presumption that the use is hostile coincides with the burden of proof of title by adverse possession and, while there are differences, it does not seem necessary to treat this issue differently, so this court will use that presumption and find that hostility is established. [It is more consistent with reality to presume permission except in the cases where the nature of the land makes it less likely that the owner would know about the use. A landowner who knows that someone is using a road across his land is likely to object unless he has permitted it. As we do not know the nature of this land, we should place the burden of proof on Alice.

Many courts state that there is no requirement of exclusivity for an easement, as opposed to title, by prescription because an easement is a right to use and normally does not exclude the landowner. Even those courts that state an exclusivity requirement, with a couple exceptions, do not apply it to exclusion of the owner. The only issue here, then, is whether the use of this road by two others for some period of time negates any such requirement. Most courts, even those that otherwise do not require exclusion, will find that there can be no prescriptive easement in an individual of a road used by the public, so the area of disagreement is narrow. This claim is based

on Alice's use, not any other, and the use by two others is hardly use by the public, so this requirement, if any, is satisfied, and Alice has proved an easement by prescription. [Alice may have satisfied this requirement but not the hostility requirement, so there is no easement.]

Alice also assets damage from water flowing over the road as a result of Bill's foundation. There are three theories of tights and liabilities in surface water. The first, and oldest, is the common enemy rule; surface water is a common enemy and any occupant may eliminate it in whatever way she can. Under this rule Bill would have no liability.

The second is the civil law rule, imposing a servitude on lower land to receive water from upper land when both are in their natural state. We do not know the state of Alice's land. The increased discharge of water seems to have resulted from Bill's foundation, that is a change from the natural state of his land, but there is no evidence of recent changes in her land, so under this theory he should be liable for damage from the increase.

Until recently, courts were about evenly divided between these two theories, but the strong trend today is away from both to a theory of reasonable use. We look at the reasonableness of the use that has caused the problem, and whether the use of the damaged land has contributed to it, and distribute the loss accordingly. Building a house seems to be a reasonable use (he had no right to build it over an easement, but that is a different issue). Alice has not shown that there was any indication that this was a poor placement of the house, or that any other placement would have improved the situation, so we find Bill's use reasonable and deny Alice damages. We believe the reasonable use theory balances the interests of the parties better than either of the others. (Bill should have the burden, under the reasonable use theory, to show that this was a reasonable placement of his house, and he has not done so.] [The common enemy rule is better because it provides certainty. The parties know their rights and know who needs to provide for drainage and so do not have to litigate the issue. Litigation is expensive and divisive and should be avoided when possible.]

Finally, Bill argues that Alice is estopped because she did not file a suit until eight months after he began building his house. Estoppel is based on detrimental reliance on a person's failure to act. The question here is whether Bill was justified in relying on Alice's failure to sue or otherwise object until after he had spent significant money on building. The parties had talked after he blocked the easement with construction materials, and they had agreed that litigation was probable. He knew that she objected at that time. He certainly could not begin his construction relying on any failure to object because she had objected. However, as he continued and she did nothing, he could have been justified in believing that she had changed her mind. Certainly, she needed only to let him know that she had not withdrawn her objections and would bring a suit. Therefore she may not require removal of the house. She does have a remedy, however. Bill should provide an alternative route for her, and pay the cost of necessary improvement. If he fails to do this, we will order him to remove the house. [Bill was aware that Alice objected, so he was not justified in relying on her delay in filing suit.]

Issues

- 1. Can Pat, as a property owner, enforce the restrictions?
 a.Did the plat or the deeds state who can enforce them? Is there anything in the plat or the deeds that would indicate an intent as to who can enforce?
 b.Can the court look to facts outside the plat and deeds to find intent?
- 2. Were the restrictions waived by acceptance of violations in the past?

Common Problems

- 1. No students fully discussed the question of how to determine who can enforce covenants when that is not specified in the documents, and only a few discussed it at all. This issue called for a discussion of the differing views as to what evidence may be used to decide that question and could not be dealt with in a sentence or a paragraph, as many did.
- 2. Many used implied reciprocal servitude as a basis for allowing enforcement. Reciprocal servitude is one possible basis for finding an intent that owners be able to enforce restrictions, but the servitude is not implied in this case; the restrictions are clearly stated in the recorded documents, and they constitute reciprocal servitudes. The reciprocal nature can be used in some states to infer intent as to enforcement, but most students did not discuss intent.
- 3. It did not affect the grade if the discussion was appropriate, but I do wonder why many students changed my terminology. The question stated that Don alleged waiver of the restrictions. Many students discussed acquiescence, which is not exactly the same (acquiescence is passive acceptance, while waiver is intentional relinquishment of a known right). Some discussed estoppel; that requires detrimental reliance on a representation, action, or failure to act. Some discussed abandonment; that is also intentional, but is generally broader than waiver. It indicates that the restrictions no longer have any effect, while waiver will usually apply only to failure to object to similar violations or violations that are adverse to the particular party.

Sample Answer

Don is enjoined from making his improvements. [Don is enjoined from constructing the deck, but may proceed with the bay window.] [The injunction is denied.]

Don's construction clearly violates the requirement that he obtain Otto's approval for any alterations or additions to his building and the prohibition of any obstruction in the channel. These restrictions were in all of the original deeds conveying lots in the subdivision, either directly or by reference to the recorded plat, so Don was clearly on notice of the restrictions. Pat informed him of them when he began construction, so he was aware of them early. The only defenses he makes are that Pat, as an owner of property in the subdivision, does not have standing to enforce the restrictions, and waiver by acceptance of prior violations.

The question of who can enforce subdivision restrictions is a difficult one on which courts

are not in agreement. There is no problem if the recorded instruments clearly indicate who has the right to enforce, but these documents do not. The provision for approval of original construction gives that right to Otto or his successors, but even that does not say who can enforce the requirement. It does indicate that these covenants were to be ongoing, not just for Otto's benefit as he developed the area, and it could be some evidence of an intent that owners can enforce because that probably is the only way enforcement would occur after the subdivision is completed. However, this clearly would be inadequate in those states that apply the statute of frauds to this question and require that the recorded instruments state who can enforce. They do that so all the purchasers may know not only that their land is restricted, but also that any variance from the restrictions would have to be approved by all the other owners.

Many, probably most, states allow extrinsic evidence of that intent, but they vary in the evidence that will prove it. The most common type of evidence is a common plan. If the recorded document show a common plan of development, many courts will infer from that an intent that the beneficiaries of the plan, the land owners, may enforce the restrictions. Some require in addition that there be some evidence, other than existence of a common plan, that would put purchasers on notice that owners could enforce the restrictions. There is a common plan here; while some restrictions are limited to lots on the channel, they are intended to make the bay accessible to all of the lots, and so serve the common plan. There is not, however, any additional evidence of intent, other than the provision for approval by Otto or his successors, which would not notify purchasers of mutual enforceability of the restrictions.

This court does not accept the strict application of the statute of frauds to this issue. It does provide for certainty, but it does not protect the benefits most purchasers expect when they purchase this kind of property. A better view will look to the expectations of the purchasers. They bought land on a bay and expected to have unimpeded access to the bay. The restrictions in their deeds seemed to assure that access. There are also aesthetic reasons, but they clearly intended to protect access, which is the primary, and maybe the only, issue in this case. Because no other means of enforcement is provided, the owners' rights can be protected only by giving them individually the right to enforce. We believe that was intended.

There is insufficient evidence that owners were intended to have the right to enforce these covenants, so the injunction should be denied. The documents do not express any specific intent, but at least the covenant requiring Otto's approval for alterations and additions should not be enforceable by others. Only Otto can approve, so it does not make sense to think that anyone else should be able to prevent construction. There is nothing in the documents that would put a purchaser on notice that any owner could enforce any of the covenants, so that intent should not be applied. We do not need to adopt the statute-of-frauds rule to decide this case, but it does have merit as it protects the free use of property.

Don argues that the restitutions have been waived by allowing other violations, and points to angle irons, a television antennae, and a rain gutter that extend over the channel. It is true that failure to object to violations may indicate an intent relinquish the right to object, but application of that is limited. The violations alleged are comparatively minor in that they extend a maximum of four feet over the channel and probably are much higher than the deck here. It will extend eight

feet over the channel. Acceptance of the earlier violations should not suggest that this deck is acceptable. It clearly is not acceptable to Pat, as indicated by her suit. There is no evidence of how the other violations affected her, but even if they bothered her, they do not prevent her claim here.

[Pat has not waived objection to the deck, but the bay window does not seem to intrude on use of the channel as much as the other violations, so she has waived any objection to it.]