

421027

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Institution **Harvard Law School**
Course / Session **S21 Fisher Property**
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Exam Mode **TAKEHOME**
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Event **NA**

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Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	998	5023	6003
Section 2	280	1407	1687
Section 3	400	2049	2446
Section 4	95	506	601
Section 5	1507	8225	9732
Total	3280	17210	20469

Answer-to-Question- 1A

Conveyance of the Farm

_____ Because Paula and Owen owned the property as a TE, were married and met the four unities: time, title, interest, and possession, upon Owen's death the farm transferred to Paula in fee simple via the right of survivorship.

Paula's conveyance to the Talia would effectuate a fee simple. However, since Talia and Sam are domiciled in California at the time of acquisition, their assets may be subject to community property law, which he could argue makes further conveyance without his consent invalid. This argument is unlikely to succeed because the farm was not acquired by effort skill or industry. Thus, Talia's conveyance of a portion of the land held in fee simple to Dan was valid.

Affirmative Easement

_____ The affirmative easement for use of the driveway is an easement Appurtenant as the benefits are inseparable from the use of her land. Accordingly, the easement runs with the land.

Real Covenant/Equitable Servitude (use)

Regarding the use of the farm as a schoolhouse Ellen can argue that this violates Talia's agreement to limit use of the land to farming and residence and is enforceable as a real covenant with damages, as it was in writing, Talia and Dan had mutual privity via the easement for the driveway and Sam followed Talia's entire interest in the farm. Finally, the restriction touches and concerns Ellen's land - its purpose was to retain tranquility. However, Sam can argue that the language is not sufficiently clear to establish Talia's intent that it run with the land. Ellen will likely point that the agreement refers to binding her "heirs and assigns" which is sufficient.

Alternatively, Ellen can pursue enforcement via injunction as an equitable servitude, which would not require Ellen establish horizontal privity. Sam may argue on the same grounds against enforcement here, and also claim that since he did not take part in the transaction, he did not have notice, but this is likely to fail if Ellen produces the writing.

Nuisance (school Use)

____ If the covenant/servitude is unenforceable, Ellen may claim the school-use as a private nuisance on the basis of diminution of property values arising from public health non-compliance. Although Sam doesn't intend the harm, he has created the conditions for the harm, so could be liable for a private nuisance.

Nature: Sam's use of the farm as a schoolhouse is not morally objectionable in the

spirit of a gambling hall, but the public health risks are arguably improper. However, Sam can argue that his use is serving the public good on balance.

Kind of Harm: The benefit Ellen is deprived is serious if the diminution of property values is certain, substantial and beyond speculation (*Arkansas Release*). But Sam can posit that the diminution is highly speculative since, as of yet, his activities have not become widely known, the pandemic is temporary and the risk of transmission from an adjacent farm is low, so, even if unwise, is not an unreasonable interference with Ellen's land.

Degree: Sam may argue that Ellen is being extra sensitive about the presence of unmasked children on the property and that the ordinary neighbor standard allows him to reasonably use his property to teach. If Ellen can prove the real diminution of her property value, she may prevail here, however.

Expediency: Sam will argue that the use of the school is on balance a social benefit, since children are otherwise deprived in-person classes. Though Ellen will argue that violating public health guidance expressly undermines this social benefit.

Usage: Ellen has a strong case that Sam's usage is contrary to community custom, which is further bolstered with reference to Talia's prior agreement.

Remedies

_____ If the court considers the schooling a nuisance, the court may issue an injunction, although, if the social benefit of schooling is considered greater, damages may be awarded instead (*Boomer*)

_____ Nuisance (smell)

_____ Ellen may also attack Sam's manure pile as a private nuisance as a result of the smell and flies (*Spur Industries*)

Nature: There is nothing inherently immoral about the Sam's use of the property as a farm with its attendant unpleasantries.

Kind of Harm: the smell and flies may be sufficient for Ellen to claim she is deprived reasonable use of her property, and if the court embraces the *Prah* approach may consider that the relative rights of each party means that it would be reasonable for same to move the pile.

Degree: This will depend on the extent to which Ellen's use of her property is disrupted, with regard to the frequency of wind, extent of smell and flies and her ability to spend time outdoors (*Spur*).

Expediency: Sam will argue that he has revived the farm to strong productive use and that an injunction would be socially detrimental on balance, although the court may consider it reasonable to move the pile without ceasing operations.

Usage: Sam has a strong case that his use is consistent with the rural setting and traditional use of the property.

Coming to the Nuisance: Ellen arguably came to the nuisance by buying adjacent to a farm. In that case, she may have to indemnify Sam if an injunction is ordered.

Zoning

The paint-job and disrepair may not qualify as a nuisance but Ellen could appeal to local zoning - historic preservation or aesthetic ordinances. Sam could challenge the aesthetic ordinance on the basis that the ordinance is too vague to comply. (*Stoyanoff*)

Trespass vs. Right by Prescription (Fishing)

____ Sam can assert Ellen is trespassing, which would subject her to injunction/ejectment, and damages (compensatory/punitive). Ellen may posit that she enjoyed a right by prescription to fish, if the statute provides for prescription after 10 years (2004-2015). Her use was open, visible, continuous and apparently uninterrupted. It is questionable if her use was made as a claim of right Sam was not at a disability to enforce his rights and had not utilized statutory means to stop Ellen.

Ownership of Fish

_____ Sam has common law right as first-taker of possession to the fish.

Answer-to-Question- 1B

_____ Presuming that Illinois enforces the implied warranty of inhabitability, the doctrine of *caveat lessee* on which Sam relies is no longer valid. Under the Implied warranty, Sam is obligated to maintain premises that are clean, safe and fit for habitation. As the warranty covers all latent and patent defects, Frank can argue that Sam has failed his burden by not providing sufficient heat. Sam will argue that living at 55 degrees does not negatively impact Frank's health or safety (St. Hilder), that the house is up to code and that Frank's failure to heat the oven is his own responsibility. Upon Frank's withholding rent, the onus is on Sam to sue for ejectment. The court will then determine whether, before withholding rent, Frank gave Sam notice and an opportunity to make improvements. Sam will argue that two months does not constitute sufficient opportunity, but his initial response (pointing to the lease) will probably undermine this argument. If the court finds that Sam failed to repair within a reasonable time and that the defect existed throughout the rent-strike, Frank will not owe back-rent. Frank may also pursue compensatory damages to cover the difference between a habitable apartment and that which he was provided, as well as tort damages for his annoyance and discomfort. It is unlikely Frank will win punitive damages as it does not appear Sam acted out of personal ill will - unless Frank can establish that there were personal insults during their arguments which suggests a climate of oppression and disregard for Frank's rights. If Frank prefers to stay in the apartment he may also choose to repair the heating himself and deduct his

Answer-to-Question-__1C__

Sam has a life estate.

Talia's estate would retain a Reversion.

Rebecca and Quentin could have either contingent remainders (conditioned on graduating from professional school) or shifting executory interests (from Sam to the first to graduate upon graduation). The court is more likely to interpret Talia's intent to allow Sam's life estate to be completed, rather than cutting it short, as he may be able to make a claim under spousal allowance provisions regardless.

The contingent remainders may be void under the rule of perpetuities, since either Rebecca or Quentin could have a child, then they could both die before graduating and the descendent child's interest would not necessarily vest (the grandchild would not have graduated) until more than 21 years after their deaths. The clause would thus be struck to the comma, leaving Sam with a life estate, with a reversion to Talia's estate. In line with the preference for alienability, the court may then find that the reversion interest passed intestate to Sam, creating a fee simple in the farm with him. Alternatively, under the law of intestate succession, if the interests pass proportionally, Sam may only retain a portion of the reversion interest and Rebecca and Quentin would accordingly each have a vested

remainder in the portion of the reversion left over.

Under this latter scenario, Rebecca and Quentin's future interests mean the property is subject to the waste doctrine. Sam would accordingly be under a duty to prevent any lasting injury to the property or destroy its identity. Sam's cutting down the trees is arguably an injury of lasting and permanent character, which could give rise to a claim for Rebecca. However, the change was consistent with the use of the property as a farm and the court may be reluctant to favor Rebecca's nostalgia-driven objections (*Melms*). However, Sam may still be in violation for having built the rental-apartment inside the house. Although this change arguably increased the value of the property, the waste doctrine nevertheless prohibits such a material changes to the character of the building.

If Sam only holds a life estate, Ellen could be unable to enforce the real covenant related to use of the land because of a lack of vertical privity: Sam did not succeed Talia's entire estate - thus the burden is not enforceable against him. However, Sam could still be subject to an equitable servitude where enforceable by injunction.

Answer-to-Question-__1D__

If Illinois enforces a riparian rights regime as set forth in *Merriweather v. Evans*, Sam may use as much water as he needs for natural uses (life-sustaining, hygiene) and for his productive farming uses, must use proportionately to the productive uses downstream. Ellen's catch-and-release fishing and filling of her swimming pool likely do not constitute productive use, limiting her claim to that water needed for natural use.

Under a prior appropriation regime, since Sam used the water productively first, thereby creating a property right in the first, Ellen is unlikely to prevail in any claim.

Answer-to-Question- 2

_____The various theories undergirding property law each offer important insights, but their value depends significantly on *context* and the relative weight of competing values or goals that a legal regime seeks to advance. Indeed, the context in a given resource may change dramatically over time, requiring that a regime be adjusted in ways that allow for emerging values and new problems to be accommodated. A basic example is illustrative: the Lockean notion of labor-based theory and its accompanying sufficiency proviso would allow people to take possession of land so long as there remains enough for those that follow. This theory may have been useful in the context of colonialism to justify settlement and the “re-possessing” of land “wasted” by indigenous people, but evaporates in the face of the zipper problem: once all the land has been claimed, the last claim and all those preceding lose their legitimacy. While the Lockean theory might be understood to be largely outmoded, more modern theories suffer from similar blindspots and benefit from the importation of concepts from other theories. Again illustration is the most effective means to elaborate this point.

_____Governance of fisheries illuminates the limits of the kaldor-hicks efficiency-oriented theory of property. In a purely market-driven allocation of fishing rights, dominant commercial actors are likely to consolidate property interests and dominate the

fishery. Absent regulation, these parties will not have much regard to the long-term sustainability of the fishery, since they have the capital to move their operations elsewhere, leaving the fishery in the state of George's Bank and the surrounding communities in the state of Golcester. In order to provide for a sustainable resource supply and surrounding economy, the legal regime must be adapted to local conditions, drawing on the various theories as useful. As George's Bank recovers, a new legal regime might consider drawing on both fairness and the personhood theory of property - to consider the identity of the fisherman in connection with their work. This may not justify a property right in the fish as such to local fisherman, but could serve as one basis, along with notions of distributive justice, to install a regime of permitting and/or quotas which preferences local fisherman over commercial interests.

The Bristol Bay regime can serve as a strong starting point for such a regime. By issuing permits in favor of people perviously engaged in and dependent on fishing, the Alaskan permitting system has allowed Aleut fisherman to retain an important role in the fishing economy. However, even there, the permitting system has retrenched problematic social dynamics. Scarce permits are retained by certain families who convey them typically to the oldest son. As generations persist, the number of permit-less young men grows, and conversely the number of "eligible" bachelors declines, thereby increasing social tension and financial precarity which bleeds into personal relationships and ultimately into the community at large. The lesson here is not to abandon permitting or to allow commercial interests to secure permits on equal footing but instead to take into account social dynamics (and consequences) as part of the consideration of welfare - perhaps returning to a more flexible utile-type measure, rather than pure economic

efficiency. One path forward could be to issue a larger number of permits and to issue them yearly to avoid entrenching power in relatively few hands over generations, while retaining the benefits of preserving local custom and sustainability by referencing people historically engaged or dependent on fishing.

Elsewhere, the most welfare-promoting regimes might be best informed by local practice developed over time, rather than application of mechanical rules from the outside. In some fisheries, conditions support the development of customary regimes that sustain the resource. As Ostrom sets forth, where a resource is sufficiently productive, moderately sized and predictable, then a knowledgeable community of users with an organic leadership structure are likely to develop a regime that sustains both the resource and the people dependent on it. In many fisheries, like George's Bank, this development may be improbable because the resource is so large and the fish are mobile - introducing geo-political competition and other market forces that undermine self-sufficiency. But in the case of Maine lobsters, the community practice has succeeded via the adoption of "lobster-gang" politics into the legal regime, as reflected in permitting. Beyond welfare, such custom-based regimes are more likely to align with notions of fairness and personhood as the communities that developed alongside the resources benefit from and sustain the resource.

Other legal regimes also benefit from the blending of theories. The traditional doctrine of adverse possession might be understood as incorporating several theories and, I posit, is open for new theoretical impulses in an era of reform. Adverse possession might be justified on Lockean labor theory grounds - rewarding those who put

abandoned land to good use, as well as on personality theory - acknowledging the psychic bonds between a person and the land they till. (Holmes). This comports with our intuition about the legitimate connection between an individual and the land they occupy. (Hume) More modern utilitarian grounds might also support adverse possession where the regime effectively promotes productive use of land. In the modern era, adverse possession may appear a relic of colonial speculation - or at worst an opportunity for those with knowledge of the law to exploit their neighbors (McLean). But in contemporary urban centers, adverse possession may play a different role, justified on distinct theoretical bases.

As urban landlords are incentivized to milk and then abandon properties, the housing stock for poor tenants declines. The perverse incentives to pursue scarcity rents - compounded by gentrification - means that housing stock may lie abandoned for long periods until the landlord is sufficiently incentivized to convert to a condo or rent to hipster tenants new to the neighborhood and willing to pay for both dilapidated charm and location. In this context, a new thinking about adverse possession might draw on fairness theories, justifying a more robust entitlement to housing; efficiency theory that punishes landlords who allow buildings to rot unproductively; utility-based welfare theory that recognizes the benefits to squatters and society at large via the reduction in unhoused people; as well as distributive and corrective justice, which might justify incorporating into the adverse possession test an assessment of the socio-economic position of the adverse possessor. Alone, any one of these theories is likely to produce a regime that would address the psychic-externalities of an adverse possession regime - a purely redistributive regime, for example would likely trigger a sense of injustice - but in connection, the

theoretical justifications may allow us to creatively reform regimes in a way that address the myriad and changing needs of a society.

One such challenge, perhaps the most urgent, is the increasing scarcity of water in the face of climate change. Adherents of kaldor-hicks efficiency theory have posited that the most secure path forward is to create a market for water via private, alienable rights, which will allow resources to flow to their most efficient users via interbasin transfer. However, such a regime fails to take into account the externalities of inter-basin evaporation and waste and more fundamentally depends on the rationality of the actors. Behavioral economists tell us this is a problematic assumption (Jolls et al.) Because of the various and incongruous regimes presently governing water, those who have prior appropriation rights will experience the endowment effect and be unwilling to enter into efficient deals. Similarly, market players will be overly optimistic about the likelihood of drought and prospectors will underinsure against this possibility. Markets are also likely to skew in favor of those able to pay - not necessarily those who can put water to most efficient use. In sum, efficiency alone is likely insufficient to create a working legal regime for the future water supply. Looking to customary practice is of limited use here, as well. Although the prior appropriation regime developed and hardened over time via common law (*Coffin*) - there is good evidence this is not the result of its efficient or equitable impacts: seniority does not necessarily correspond with efficient use and the regime does not account for inefficient means of inter-basin transfer. So we must look elsewhere.

Broadening the conception of welfare would allow a new regime to take into

consideration the collective benefits of water not associated with its use - most obviously, the habitats it provides for birds and fish. Given the inter-state and urban-rural dimensions of the problem, there may also be a need to take distributive or corrective theories into account. That is, how to ensure that ability to pay among lawn-mowing phoenix residents doesn't defeat the needs of rural communities in the central valley. On a similar dimension, a new regime may need to address the personality-theory concerns among farmers and ranchers, who on the basis of priority claim to own the water beneath them and to which they are accustomed. The challenges ahead are many and complex. The theories of property undergirding our system must be combined and supplemented to address them under dynamic conditions.

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