

EXAMPLE ANSWER
COMPILED FROM STUDENT ANSWERS
FOR
PROPERTY FINAL EXAMINATION
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NOTES:

The answers given below are compiled from several student answers. That is, the answer for one issue may have been written by a different student than the answer written for another issue, etc.

The answers below were selected because they were the one of the highest point-obtaining answers for a specific area of law or issue among a few of the student answers that earned a high grade on the examination. The answers are provided directly as written by the student, without any spelling or any other type of correction or editing. These are not necessarily “perfect” answers, or even answers that noticed all the issues or got everything correct.

A. IRAC

1. *Andy versus Edward*

A would sue for the rents that he has not received from January 1992 until the end of the lease for Dec 31 1992. A would argue that Darren (D)'s conveyance, the language, constituted an assignment. An assignment conveys the whole term, leaving no interest, no reversionary interest in the grantor or assignor. In rebuttal, E would argue that the conveyance from D to E is a sublease.

First, A's estate is a presently possessory life estate so he does have the initial ability to lease the state to Darren. The lease was for a term of years - Jan 1991 to Jan 1993, two years.

Originally, when A leased to D, A had privity of estate and privity of contract with D. If the document was an assignment, then D's privity of estate would pass to E and E would be liable to D for the unpaid rent for the period that he remained in privity of estate with A.

A would argue that the modern approach under *Ernst v Conditt* should be followed in that whether a grant is an assignment depends on the intent of the parties, the words used can be the most important but are not dispositive. Then A would argue that the conveyance specifically used the word assigned in the language. Thus A would contend that this shows the parties' intention to make the grant an assignment. In rebuttal, E would argue that the language also states that this is a 'sublease' thus the term of the contract of sublease should prevail. A would then contend that since D was a full-time skier on the international circuit, and has sold the business to E, it is reasonable to assume that D conveyed the entire interest, thus further evidencing intent of an assignment. Under the modern approach, A may have a chance at establishing privity of estate with D.

Alternatively, E would also argue that the formalistic rule should be followed. If a lessee transfers his entire interest under the lease or duration of the term it's an assignment; otherwise, it's a sublease. E would argue, (while my math may not be clear), that an assignment of 20 months beginning April 1, 1991, would end specifically in the month of November, thus this would be one month shy of the entire lease and D would retain a reversion. If this is the case, A will probably not be able to counter this argument and E would prevail. Thus, privity of estate would not pass. Therefore, whether A can recover the unpaid rent depends on whether the court follows the modern or common law rule.

2. *Harry versus Becky*

The issue here is whether Harry may *Krostacre* from Betty. The rule against Perpetuities wipes out future interest where there is a possibility that they will not vest in the lives in being plus 21 years. The grant from Oliver conveyed a life estate to Andy, followed by a FS/SEL in Becky and an executory interest. The executory interest has the possibility of failing at the time of the grant. If at the time of the grant, Gerald and Harry were to die (as they are the lives in being at the time of the grant who can affect the vesting), then the estate would not necessarily vest within 21 years. Gerald could have an afterborn child, and that child does not have to reach 23 within 21 years of Gerald's death. Moreover, the Rule against perpetuities strikes out this executory interest. The suit by Harry against Betty will therefore fail.

3. *Gerald versus Becky*

Gerald has an adverse possession claim against Betty. An adverse possessor must: 1. Actually possess or occupy the claimed land 2. Exclusive of others rights 3. In an open and notorious manner 4. Under claim of right adverse to the owner 5. In a continuous and uninterrupted fashion for the statutory period. Before the statutory period is up, if there is a voluntary transfer (with privity) between one adverse possessor to another, the duration of their possessions may tack together to reach the statutory period. Because Gerald seeks to tack his 8 year period of occupation onto Frank's previous 2 year occupation, the circumstances of F's occupation are important.

When Frank entered adversely to Betty, he entered under Color of Title, because he had a deed (albeit a false one). Color of Title goes to the claim of right element. Normally, an adverse possessor under claim of title will be found to have constructive possession of the entire piece of land,

while an adverse possessor without claim of title only has possession of the part of the land he actually enters (see Lutz). However, constructive possession under color of title assumes that the rest of the land is vacant. Because Betty was in possession of the other part of the land, Frank may only claim the Northern 700 acres that he actually did enter. It would be poor policy to let an adverse possessor divest an owner actually in possession of the land she was making productive use of. Because G satisfied the claim of right element and also took possession under a deed (from F), both F & G satisfied that element for the time they were on the land. Because they truly believed they owned the land (they had a deed) they would satisfy both an objective and subjective test as to claim of right.

F & G both satisfied the 'exclusive of other's rights' element because they chased off other people from their lands, asserting exclusive possession. The noise and smoke from their tractors made their possession open and notorious, and B was in fact put on notice that other people were in possession of part of her land. There is no indication that F & G ever left the land for any abnormal period of time, so their periods of possession may tack (2 years + 8 years) and the statutory period is satisfied to give G new title over the 700 northern acres of Krostacre.

4. *Darren's company versus GSB*

Darren's company (DC) has a misappropriation claim against GSB. The misappropriation test set forth in *NBA v. Motorola* includes 1) a plaintiff generates or gather information at a cost, 2) the information is time sensitive, 3) a defendant's use of the information constitutes free-riding on the plaintiff's efforts, 4) the defendant is in direct competition with a product or service offered by the plaintiff's, 5) the ability of other parties to free ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product that its existence or quality would be substantially threatened. D is generating the information at cost because he spend money on his travels. GSB will argue that D was travelling anyway and there was little cost involved in the additional monitoring of the surplus property. The info D gathers is time sensitive because the cheap surplus property is sold first come first served. GSB use can be considered free riding because GSB is gaining the information solely through the efforts of D. GSB can argue that the info was in the library and the library is public access, but this sort of arguement didn't work in the *INS* case although that was partially due to the element 4). GSB is in direct competition with D in the area of D's distribution. GSB's only argument could be that they're not totally in direct competition but this is weak. GSB free riding use makes the incentive for Ds subscribers to subscribe less because the users of GSB's product can beat them to the property. It creates more competition for the surplus property thus less incentive to buy D's newsletter. D's subscriber's also might just by GSB's product. D should be able to prevent GSB's use of the information due to misappropriation.

5. *Darren's estate versus Janet*

The issue here is whether Darren's estate may clear any easement that Janet may claim for the pipe running under Darren's land. Since there was no explicit easement and Janet made no improvements which would entitle her to an easement by estoppel, Janet may attempt to obtain an easement by prescription, implied by prior use, or by implied by strict necessity. An easement by prescription must meet all of the elements of adverse possession as listed in the previous question.

Janet's easement probably fails under prescriptive easement because it was probably not hostile (under ME doctrine) to Darren or open and notorious (although Darren knew about it). Darren may have also consented to its use, which fails the hostility requirement.

Janet's easement may win however, by prior use or a quasi easement (all land previously owned by the previous owner). To have an easement by prior use there must be prior common ownership, prior use, and the following factors will be analysed: 1) conveyor or the conveyee 2) term of conveyance 3) consideration 4) made against simultaneous conveyee 4) extent of necessity 5) reciprocal benefits 6) manner land used prior to conveyance 7) knowledge to parties. This case is similar to *VanSant v Royster*, where the court found an easement by prior use. That case however was for an implied reservation because it was for the benefit of the grantor. Here the easement in question is for the benefit

of the grantee and would be an implied grant. In that case the court rejected the English rule, which put a "hairy eyeball" on an implied reservation and held that they are equal to an implied grant. Now to the elements, Because Darren owned all of the land there was prior common ownership. Darren also used the pipe for his garden before Janet, which established prior use. The implied easement would be for the benefit of the grantee, Janet. This factor helps Janet, because of the old English rule. The term of the conveyance is not applicable, as there are no facts to indicate the term of the estate. There was consideration given by Janet for her land to Darren. There are no simultaneous conveyees. The necessity element is not a strict necessity element merely a necessity. Here the case would turn on whether or not the court found the necessity to run water from the lake because it is cheaper or whether Janet could just as easily pump water from the road. Because this is not strict necessity, the court would likely find for Janet on this element. There are no reciprocal benefits from it. However, the land was used in the same manner by Darren previously, which helps Janet. Darren and Janet also knew of the pipe, which puts them on notice of it. Altogether, the court may find that Darren's servient estate is charged with the implied easement by prior use. Darren's estate would be the servient estate because it is the one which is encumbered, while Janet's is the dominant estate because it would benefit from the easement.

An easement by strict necessity will probably also fail. In order to obtain an easement in this manner, there must be unity of ownership, necessity, and necessity existing at the time of severance. There was unity of ownership b/c Darren owned both lots originally. However, as previously noted, Janet could obtain the water from the road, which makes her necessity not strict. Thus, no further analysis of this method is needed. Under this rule, the easement only lasts as long as it is necessary, and it is not currently necessary.

Altogether, Darren's estate may clear easements from his property other than an easement by prior use. The court will likely find this to be implied by prior use (quasi easement).

B. Policy Analysis

Arguments for the proposal

Proponents of the proposal will likely point out that email is a common resource. In the Tragedy of the commons, Hardin said that people will take advantage of a common resource. Hardin's solution is to privatize the resource. Here the proposal, while limited to the voluntary element, disincenativises people from sending spam as it will cost them money. These spammers usually send out much more spam than they receive. Demsetz would call this an externality because it is a cost to others to have to read the spam. Spammers are freeriding as they are using the benefit of email sending without paying for it with any externality to themselves. Thus, the proposal takes away the commons situation that is currently in place with email and privatizes the rights of individuals not to receive spam. This close to the right to exclude others, which was illustrated in *Jacque v Steenberg Homes*. The court ruled that the property right of the property owner allowed him to exclude all others from his property. If a charge is put on the email, it partially gives people the right to exclude. However, this is not like the property rule given in *Jacque*, it is more like the liability rule, which says that you can take property from another as long as you pay for it. This is similar to the fungible property concept that Radin introduced in *Property in Personhood*. This says that property is fungible if others can take it away simply by paying the market price for it b/c there are no other personal attachments or biases to the property. Here the property is fungible meaning that people may spam, if they pay for it. Altogether, Proponents will say that by privatizing the rights of this common resource by charging fees for email will lead to less abuse by spammers.

Arguments against the proposal

Opponents of the new rule will likely point to the Coase theorem, and say that without high transaction costs people will probably bargain for these rights on their own. The problem with this theory in this situation is that there are likely to be high transaction costs. Email recipients would have to bargain with many spammers to get them to stop spamming, making the transaction costs very high. Thus, people probably will not bargain for this right. Opponents will likely also argue that the opt-in system may be not narrowly accomplish its objective. Non-spammers who do not opt-in will be charged for everyone they email, while non-spammers who do may receive benefits more than they are entitled to. Opponents may also argue that the rule is tough and costly to implement, as every email server must now account for this. Finally, Opponents will probably argue that Locke's labor theory entitles email users to the email because they attached their labor to it.

Because the reasons for the rule outweigh the reasons against it, it should be implemented. People will not bargain for this right on their own, thus the government should step in and privatize the rights in the commons. This simple fee will not lead to over privatization, which is the situation in the Anticommons (underuse). The fee is not an absolute right to exclude, it is a liability rule. Additionally, people will still send email because non-spammers will likely reciprocate their emails, costing them nothing. The only change may be to make it mandatory. This would exclude the possibility of normal non-spammers being far out of balance with one another. Altogether, by privatizing the rights of the common resource, abusers (spammers) can be stopped.