

Property

Professor Perritt

Model Answer

Spring 2010

QUESTION I

- A. For Random Nonstories to obtain an injunction against Steele it must plead and prove that it has a property interest in the third floor. There are no facts in the question supporting a property interest by gift, inheritance, or deed, so Random Nonstories must establish either an estate by adverse possession or an easement by estoppel or prescription. There are no facts supporting an easement implied by prior use or easement by necessary: there was no severance of a once-common estate.

The strongest arguments for Random Nonstories are adverse possession and its close relative, easement by prescription. Both require (1) actual and continuous possession of the claimed property (2) for the requisite period, (3) possession that is open and notorious and (4) possession that is hostile to possession of the property by the original owner. Random Nonstories has a strong argument that it is in actual possession, based on its storage of personal property there and its use of the space for rehearsals—apparently whenever it wants. The possession was continuous—of the same character as any use of theatre space. The length of the requisite period depends on the jurisdiction, but it is unlikely that Illinois as a prescriptive period longer than 20 years. (This is something I would confirm through research.) Random Nonstories’s possession is open and notorious, at least as to Saks and Cannon because they know the property in the space is not theirs and they know that the casts rehearsing there are not theirs or those of a tenant or licensee. Hostility is the only element as to which Random Nonstories may have difficulty. Saks and Cannon knew that they were there, they were “annoyed” by their presence, but they never did anything about it. Knowledge plus annoyance implies that Random Nonstories’s possession was hostile to the interests of Saks and Cannon. But, never doing anything about it is consistent with their having granted permission.

If Saks and Cannon granted permission for Random Nonstories’s possession, both adverse possession and prescriptive easement fail as legal theories. Rather Random Nonstories was a licensee, and the license could be revoked at any time at the will of Saks and Cannon—the licensors. Such revocable licenses can ripen into easements by estoppel, but only if the licensee relies on continuation of the license and invests in substantial improvements with the knowledge of the licensor. There are no facts suggesting that Random Nonstories made improvements to the third floor, so easement by estoppel cannot be established.

Whether permission can be inferred from Saks' and Cannon's passivity probably is a fact question for the jury, but most of the license cases I already know involved evidence of explicit verbal (either oral or written) permission. Overall, Random Nonstories has a strong case for either adverse possession or prescriptive easement.

The difference is that adverse possession gives rise to a fee-simple interest, while prescriptive easement only gives rise to a right and privilege to continue the use giving rise to the easement—storing costumes, props, and scenery and “occasionally” rehearsing there. If Random Nonstories can establish only a prescriptive easement it cannot get an injunction against Steele's using the space, but only one against Steele's interfering with Random Nonstories's established uses. If it can establish adverse possession, it is entitled to an injunction against Steele's entering the space at all.

Whether adverse possession or only a prescriptive easement is established depends on whether Random Nonstories's use of the space was exclusive. It almost surely was not—Saks and Cannon remained free to use the space for purposes other than storage when Random Nonstories was not rehearsing there. If they Steele can prove that they did so, she defeats the exclusivity subelement of the possession element. If she cannot, she has a weak position—except for the argument that follows—on adverse possession.

Steele's strongest argument is that she is a bona-fide purchaser for value. Under both the common law and IL statute, 765 ILCS 5/30, a prior property interest such as an easement or adverse possession claim is void as to subsequent purchasers without notice. Random Nonstories will argue that Steele had inquiry notice of Random Nonstories's possession of the space: she had an obligation to inspect the premises and if she had, she would have seen the stuff stored there and the rehearsals. Steele will argue that, even if she had seen the personal property and a rehearsal in all of its artistic horror, she would have assumed that it was taking place under the authority of Saks and Cannon and thus would have had no reason to inquire further. Whether inquiry notice existed also is probably a jury question, but Steele has a strong argument.

It is questionable whether she will be able to resist the motion for an injunction successfully, but, at worst, she probably can limit an injunction to forbid only her interference with Random Nonstories, based on a prescriptive easement, and not an injunction against entry, based on adverse possession. She also may be able to narrow the injunction to interference with the personal-property storage, based on her argument that Random Nonstories's rehearsals were not sufficiently continuous to establish the first, possessory, element of the prescriptive easement.

B. Phelps and Schuba both have shifting executory interests, subject to the Rule Against Perpetuities. They are executory interests instead of remainders because they cut short the preceding estate of Steele upon the occurrence of certain conditions not certain to occur. Phelps' interest is valid under the Rule because it is certain to vest or to be defeated within

a life in being—her own. While TMFSS may not cease to be used for theatrical productions (the first condition) during her lifetime, such continued use would defeat her interest when she dies because the condition of her being alive and the cessation of theatre use must both occur for her interest to vest and to become possessory.

Schuba's interest is void under the Rule, however. Phelps may die while the building is still being used for theatrical productions. Schuba, Steele, Saks, and Cannon may all die, but Steele's heirs may continue to use the building for theatrical productions for another 513 years, meaning that the interest in Schuba's heirs would remain contingent for that long, far too long to satisfy the Rule.

C. First I would determine whether we have any arguments that the ordinance is ultra vires because it is outside the legislative power delegated to the Chicago City Council by the Illinois state legislature under authority granted to it by the Illinois state constitution. If it is outside the Council's power, it is void, and Steele need not pay any attention to it. The Illinois statute granting zoning authority to municipalities, as I recall, is very broad, authorizing almost any kind of restriction on property use that the municipal legislative body judges to be necessary to promote the public safety, health, or welfare. But I would check the exact statutory language and caselaw to see if we have an ultra-vires argument.

If it is not ultra vires on statutory grounds, we should make arguments that it is unconstitutional and that if it is not, Steele is entitled to just compensation for a governmental taking of her property. These constitutional arguments require us to establish coverage by the Fourteenth Amendment, which prohibits (a) states, (b) from depriving any person of life, liberty, or property, (c) without due process of law. State action clearly exists here, because it is the City of Chicago that has passed the ordinance.

Establishing deprivation of property, however, is problematic because the ordinance does no more than impose a duty on Steele that she already has under the easement, which now arises from express grant in a deed. To get to her due-process and takings arguments, she has to establish that the ordinance takes away something in her "bundle of sticks," notwithstanding the easement. One possibility is to argue that the easement is invalid because it is reserved to a third party, in gross (there is no dominant tenement here, only ownership of the easement by Random Nonstories). That will be an uphill battle because Illinois, like most modern states, probably allows easements to be reserved in favor of third parties. That is something I would want to check through research into Illinois caselaw.

A stronger argument on the property-deprivation element is that, if Steele were only burdened by the easement rather than the ordinance, she could bargain with Random Nonstories and find a price at which Random Nonstories would relinquish its easement. She cannot do that with the ordinance. Under this theory, the ordinance has deprived her of a stick in her bundle—the power to bargain to enlarge her property interest.

Assuming we get past the property-deprivation obstacle, we then need to marshal three due-process arguments: that the ordinance is void because it violates substantive due process, that the ordinance is void because it is a taking unjustified by public use, or that its enforcement constitutes a taking for which she is entitled to just compensation.

Substantive due process allows property deprivations only when they have a rational relationship to a legitimate state interest and are thus within the police power of the state, under the Supreme Court's decision in *Euclid*. The City Council probably can identify a legitimate state interest in promoting the theatrical arts by ensuring storage and rehearsal space for small non-profit theatre companies. But this ordinance is grotesquely underinclusive. Rather than assisting small non-profit theatre companies in general and burdening property owners in general, it singles out one entity for the benefits, and only one for the burdens. Steele has a compelling argument that this violates the substantive-due-process requirement for a nexus.

We also might have a fundamental rights argument, based on freedom of expression. While the ordinance does not single out a particular form of theatre for benefit, it does single out a particular theatre company and privileges its expression. But we really do not need to prevail on this argument, which would ratchet up the requirement for nexus to a legitimate state interest to strict scrutiny. This ordinance fails the more permissive rational-relationship test.

In addition to this general due-process argument, we also have two interrelated takings arguments. The ordinance manifestly works a taking of Steele's property (assuming she can overcome the deprivation problem discussed above). Requiring her to allow continued storage of Random Nonstories's property on her third floor constitutes a continuing trespass. Even if she could buy out the easement, the ordinance makes the trespass permanent. This is a *per se* taking under *Loretto*.

It also may be a taking under *Lucas*. While she cannot establish elimination of all economically beneficial use of the building, she may be able to get a court to embrace the disfavored severance doctrine, which would focus attention on economic use of the third floor. Still, because she could make limited use of the third floor, even if the ordinance is valid, she may not be able to meet the *Lucas* test.

And, under *Penn-Central* balancing analysis, the targeting of her property and the weak nexus to public interest, suggests a strong argument for her.

First, we would argue that this ordinance benefits only a private party—Random Nonstories—rather than taking Steele's property for a public purpose. There is no obligation on Random Nonstories to serve the public, only the incidental public benefit of having yet one more small theatre company in Chicago putting bizarre productions on stage. A taking that does not serve a public purpose violates due process and is invalid.

Even if the taking is somehow justified by a public purpose, Steele is entitled to just compensation for it. She would present evidence of the reasonable market rental rate for use of the third floor, and be entitled to compensation at that level.

D. Goodman should sue Steele for violating several of the covenants implied in Steele's general warranty deed to Goodman. Illinois, like most states, presumes that a deed is a general warranty deed unless it specifies that it is a quitclaim deed or special warranty deed. (I would want to confirm this by looking at the statutory and case law.) By purporting to convey a fee-simple-absolute interest to it, though Steele had only a fee simple subject to two executor limitations, also burdened by an easement, Steele purported to convey more than she had, thus violating the covenant of seisin, the covenant of the right to convey, and the covenant against encumbrances. The easement and the executory limitations plainly are encumbrances. These are present covenants, but the question says "shortly afterwards," implying that the statute of limitations on these covenants is unlikely to have run.

Steele is likely to argue that Goodman was on inquiry notice about the easement because a reasonable inspection would have revealed the easement. Goodman will respond that any reasonable person would have inferred that the storage and the rehearsals were Steele's rather than an easement owner's. In any event, no inspection would have revealed the executory interests in Phelps and Schuba. Not only that, in some jurisdictions, notice of an encumbrance does not defeat suit on the covenants against encumbrances, when the deed is not expressly subject to them. I would have to do some research to know where Illinois stands on this issue.

Steele also has a strong argument on the future covenant of quiet enjoyment. Random Nonstories holds an easement granted by Steele's predecessor, which she clearly knew about because it was in her deed, and thus Random Nonstories's interference with Goodman's possession is attributable to Steele. She also can insist that Steele finance the litigation under its covenant of general warranty. The covenant of further assurances does not seem to come into play.

E. Irresponsible Bank's mortgage almost certainly is void under the Illinois recording statute as to Goodman because Goodman recorded its deed first with no notice of the mortgage. Steele probably took free of the IB mortgage as well because, even though she did not record her deed, there is nothing in the question that suggests she had notice of the unrecorded mortgage to IB.

The fact that Saks and Cannon held as joint tenants is irrelevant. They both granted the mortgage and they both conveyed to Steele. Saks did not die until later.

Because IB's mortgage is invalid, it cannot foreclose on the property now owned by Goodman. IB may still have a contractual claim against Cannon and Saks' estate, but that is another question.

If foreclosure somehow proceeds and is upheld nevertheless, IB would be entitled to the amount of its unpaid mortgage--\$125,000. Buffrd would take subject to the second mortgage in Sixth/Fourth Bank, or else \$25,000 would go to pay off that mortgage, and the balance would go to Goodman, which paid for the property and how has lost it in the foreclosure sale.

QUESTION II

- A. Minor should sue Blake for breach of the covenant to deliver possession and for breach of the covenant of quiet enjoyment. Both obligations are implied duties of any landlord under the common law.

Because Blake already leased Unit #101 to someone else, he lacked the power to lease it to Minor and therefore breached his duty to deliver legal possession. This case is unlike a holdover tenant situation, in which the holdover tenant lacks legal right to be in the premises. There is no need to argue for the English Rule, which requires delivery of actual possession as well as legal possession, because Blake has failed to deliver legal possession, which violated the American version of the duty.

Blake also has breached the covenant of quiet enjoyment, because his prior lease of the premises not only enabled—it ensured—that someone holding by right from the landlord would interfere with Minor’s possession, which is what happened in Minor’s bedroom.

Constructive eviction may an interesting additional theory, on the grounds that the Landlord created a situation that makes Minor a trespasser on property to which he had a possessory interest. So he is subject to actual eviction at any time at the whim of LaBreck. He is a trespasser.

On any of these theories, Minor must give up use and occupancy of Unit #101, LaBreck could insist on that in any event; Minor is a trespasser.

Trespass is not applicable because the “escorts” are not trespassers; they are agents on the property of their principal, LaBreck, who owns the leasehold. Implied warranty of habitability is not applicable because there is nothing wrong with the premises, physically.

- B. Minor should sue Souk for private nuisance. Souk’s wind farm is a use of his property that causes injury to Minor’s legitimate uses of his own property. It is not likely that Minor can establish that the wind farm operation is an abnormally dangerous activity, so he must proceed on the argument that Souk is intentionally interfering with Minor’s enjoyment of Minor’s property.

Minor would argue that intentionality is established because Souk intentionally operated the wind farm with substantial certainty that it would cause vibrations. Souk would argue that intentionality is not established because, although he might have been substantial certain that the vibrations would occur—he surely could feel them himself—he could not reasonably have

anticipated that they would kill neighboring turtles. The law is shifting toward a view hospitable to Minor's argument about intentionality, so he would have the upper hand here.

Most of the argument will turn on the reasonableness of Souk's activity, which in turn depends on its suitability for the location of Souk's use, the cost to Souk of mitigating the harm by ceasing or modifying the activity, its social utility, the suitability of Minor's activity injured for the location, its social utility, and the cost to Minor of taking other measures to mitigate the harm. Each side has substantial arguments.

Minor should argue that, while turtles are unusual pets, having small pets is surely suitable for a residential condominium. In contrast, putting a wind farm on the balcony of a residential condominium is entirely unsuitable. Such wind farms should be on the Illinois plains or off the coast of Cape Cod.

Souk will argue that "green" energy generation is socially useful, even if he only generate enough electricity to provide his own needs. The social utility of keeping hypersensitive turtles is questionable, although the social utility of keeping pets in one's own dwelling is greater.

Minor will argue that the cost of moving the wind farm activity somewhere else should not be high; the investment in the equipment surely could not be substantial, given its small size, and that investment would not be lost if the equipment were moved elsewhere, such as on the roof of the condo building. Of course the cost of moving the turtles somewhere else probably is not high either, and there may be relatively simple measures that would protect them from the vibrations.

An additional problem for Minor is that common-law nuisance does not protect against injury to ultra-sensitive plaintiffs, and Minor's turtles are apparently ultra-sensitive.

On balance, I think Souk has the upper hand, although the unusual nature of his wind farm operation may tilt a fact-finder against his position.

C. Condo declarations meet all the requirements for real covenants; indeed they were intended to be enforceable as real covenants before states began to adopt laws making them enforceable as condo declarations. There is horizontal privity because the declaration is incorporated by reference in each conveyance; there is vertical privity, at least on these facts, because each unit owner got the same estate the condo developer/grantor had in that particular space, and the provisions of the declaration touch and concern the land.

Courts enforce the provisions of condo declarations unless they are so outrageous as to violate public policy, or unless enforcement of them by courts (state actors) would be unconstitutional because they, for example, discriminate based on race. There is nothing problematic with a condo declaration provision that gives the condo association the power to make "reasonable rules." So Mills has no basis for challenging the declaration itself. It was incorporated into the

deed she took to her property, she had record notice of it, and there is no basis for claiming its invalidity.

Her challenge has to be directed to the no-tofu rule promulgated by the condo association. Courts are much more willing to scrutinize exercise of powers given in condo declarations than the declarations themselves. Mills' argument should be that that no-tofu rule is ultra vires, because the condo association is given the power by the declaration only to adopt "reasonable" rules, and the no-tofu rule is not reasonable.

Reasonableness, at its core, requires pursuit of some legitimate interest through measures reasonably related to advancing the interest. What possible interest, except the idiosyncratic tastes of one member of the community, could be served by this rule? Even if such an interest could be advanced by the association, it is virtually certain that other, less burdensome, means of pursuing it could be identified.

The analysis is much like substantive due process, but it is important to understand that this is not a constitutional attack because condo associations are not state actors, absent unusual facts not present in the question.

D. The grandmother has a big problem should either Mills or Dix or both elect to sue her for copyright infringement. Each must register her or his copyright with the U.S. Register of Copyrights before suing, but they surely would do do.

Mills can establish a copyright in the RAP outline section. It is original, assuming she did not simply copy the words from some other source. The originality requirement is very low. She fixed it when she wrote it down. It qualified for copyright as a literary work. Dix incorporated her section into his song as lyrics.

Mills will argue that, when the grandmother downloaded the song, she reproduced the lyrics, thus violating Mills' reproduction right under 17 U.S.C. § 106. When she played the song for her grandson and her dog, she publicly performed Mills' work.

The grandmother should concede that Mills has a copyright in the words comprising the outline section, but she would have two plausible defenses. First, she would argue that the contents of the literary work were not reproduced—only the sounds of someone singing them, and those constitute a sound recording that Mills did not create and has no copyright in. That's an interesting argument that has some weight, though it is not certain to succeed.

A far stronger argument exists for the grandmother on the public-performance infringement claim. One's five-year-old grandson and dog do not constitute the "public," and the only right reserved to the copyright owner is "public performance."

The grandmother is at risk on Mills' claims but not a sure loser.

She has a much bigger problem with Dix's claim that she infringed his reproduction rights in Dix's musical work and in his sound recording. (Any public-performance claim by Dix is frivolous for the same reason that Mills's is.)

Dix certainly has a copyright. Almost any music he set Mills's words satisfies the originality requirement, and he fixed both his works (the musical work and the sound recording) when he and his bandmates recorded the album. The grandmother infringed the reproduction right when she downloaded the song. The process of downloading necessitates making a copy. So the grandmother is a prima facie infringer.

The grandmother should consider a fair use defense under 17 U.S.C. § 107. Her purpose is not commercial, which may help her a little under the first fair-use factor. On the other hand it is not research, satire, criticism, or education either. What possible educational benefit could a five year old and a dog get from listening to a song about the Rule Against Perpetuities?

The second factor weighs against her, at least on Dix's claim, because the works were intended to be sold. Even Mills's work was not intended to benefit strangers, but only the members of her study group.

The third factor weighs against her because she downloaded the entire song.

The fourth factor weighs against her too. Although the impact of her conduct on the market is small, her unlicensed copying deprived the copyright owners of one sale.

While the grandmother's legal position is weak, the economic impact of losing the lawsuits is minimal, at most the price of the one copy of the album, or statutory damages for a single act of infringement.