

MONTEREY COLLEGE OF LAW

REAL PROPERTY

Final Examination

Spring 2021

Prof. J. O'Connell

Instructions:

There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

PROPERTY

Professor Justin O'Connell

Final, Spring 2021

Question 1

Able and Charles purchased Blackacre, acquiring title as "joint tenants." Blackacre consists of 10 acres of farmland with a single-family dwelling on it. Able paid 80% of the purchase price and Charles paid 20% of the purchase price.

After the purchase, Charles moved into the residence on Blackacre and began farming. Charles lived on Blackacre for three years without paying anything to Able for the use of Blackacre, and without sharing any of the farming income with Able. Able never attempted to take possession during that three-year period. Charles made all the property tax payments during that three-year period, and he spent \$100,000 in building a new dairy barn on Blackacre.

After Charles had been living on Blackacre for three years, he moved away and leased Blackacre to David for a two-year period. David immediately moved into the residence on Blackacre and began farming. David paid Charles monthly rent and a percentage of his farming income. David paid nothing to Able, and Charles did not share any of the rental or farming income with Able. Able never attempted to take possession of Blackacre during David's two-year occupancy. Charles made all property tax payments for Blackacre during David's tenancy.

At the end of David's two-year residency, Charles renewed David's lease for another two-year term. Able immediately found out and was angry because Able wanted to move to Blackacre and farm, so he executed a deed granting from himself as a joint tenant to himself as a tenant in common. Able and Charles never had any agreements, whether oral or written, regarding who would pay for taxes, for the dairy barn, or otherwise defining their rights and responsibilities as to Blackacre.

What claims could Able and Charles make in a partition proceeding?

What remedies does Able have regarding David's occupation of Blackacre?

PROPERTY

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Question 2

In 2000, Xavier sold Oscar Blackacre, which was an undeveloped 100+ acres parcel adjacent to a public road. At the time of Oscar's purchase, Adam owned Whiteacre, which was also a 100+ acre parcel of land adjacent to Blackacre and also adjacent to a public road. Right after the purchase, Oscar moved out of state.

In 2001, Adam called and asked Oscar, "Do you mind if I drive across Blackacre to get from Whiteacre to the road? It's easier that way for me. I'll only go along our common fence line." To which Oscar responded, "Sure."

In 2010, Oscar visited Blackacre for the first time since he had moved and immediately saw that Adam had not been driving along the fence line. Instead, Adam had worn a dirt road along the fence line a short way, then the dirt road turned and went straight across the middle of Blackacre. Oscar angrily confronted Adam and Adam admitted he had been driving across that access way on a weekly basis since 2001. Oscar told Adam he was never allowed on Blackacre again, then Oscar returned home out of state. A few weeks later, Adam resumed using that access way across Blackacre on a weekly basis.

In 2020, Oscar visited Blackacre and immediately saw that Adam had continued to use the dirt road he had worn into Blackacre. So, Oscar began building a fence on Blackacre across the access way Adam had been using. When Adam saw this, he said to Oscar, "I don't want to get into a courtroom fight over this, so how about you let me drive over another area on Blackacre?" To which Oscar said, "Sure but we need something in writing this time." Adam drafted up an easement deed that identified a new access way and gave the deed to Oscar to sign, but Oscar never did. Adam stopped travelling across Blackacre on the access way in late 2020 once construction of Oscar's fence fully blocked it.

Assume the jurisdiction has a five-year statute of limitations for prescriptive easements.

Discuss the easement-related claims of Oscar and Charles regarding the access way.

PROPERTY

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Question 3

Adam bought Blackacre, a one-acre parcel of undeveloped property in the country. When Adam bought Blackacre, an adjacent property, Whiteacre, was a ten-acre parcel with a small, free-range chicken farm owned by Bob, with 300 chickens. Whiteacre was zoned to allow farming of up to 300,000 chickens, and Bob had a permit to house and farm up 200,000 chickens, but he kept his farm limited to 300 chickens due to his moral objection to mass farming.

After buying Blackacre, Adam immediately applied for a building permit to build a single-family home for him and his family to live in. Before Adam received approval for construction, Bob sold Whiteacre to Chicken Town, a national chicken products company, and Bob validly transferred his chicken farming permit to Chicken Town.

Soon thereafter, Chicken Town began construction of immense, industrial chicken houses as allowed under the zoning and permit requirements. By the time Adam received approval of local authorities to build his home, the number of chickens housed on Whiteacre had increased to over 100,000.

A strong odor from the chickens drifted onto Blackacre. During the construction of his home, Adam visited the construction site many times and contacted windblown dust of chicken manure, to which he had a serious and unusual allergic reaction to. His children and spouse barely noticed the smell when they visited the construction site. Adam and his spouse were devout animal rights activists, and they abhorred the site of the chicken houses in plain view from Blackacre.

Upset about the chicken farming, Adam set up bright lights on Blackacre that shined towards the chicken houses on Whiteacre at night. The chickens became agitated from a lack of sleep and stopped laying eggs, thereby causing Chicken Town to lose revenue.

What rights and remedies do Adam and Chicken Town have against one another under the doctrine of nuisance?

1)

Question 1

1. What claims could Able and Charles make in a partition proceeding?

Joint Tenancy

A joint tenancy is created when the tenants have equal rights, rights to possession, obtained title by the same interest, and obtained title at the same time. The facts state that Able and Charles purchased the property as "joint tenants." Because this language has been expressly stated, Able and Charles are joint tenants. *good - get in and out*

Each joint tenant owns a single undivided interest in the property. This means that Able owns 100% of Blackacre, and Charles also owns 100% of Blackacre. Even though Able paid for 80% of the purchase price and Charles paid 20%, since there is not an agreement stating an unequal division of interest was intended the parties are not able to rebut the equal division of their interests. This is because unequal contributions, like in this instance, does not result in unequal division of the interests. ✓

Able and Charles are joint tenants.

Severance of Joint Tenancy

Severance results in the creation of a tenancy in common. The facts state that Able "executed a deed granting from himself as a joint tenant to himself as a tenant in common." By doing so, Able severed his joint tenancy with Charles and became a joint tenant with Charles instead. This is because the deed Able granted severed the joint tenancy and created a tenancy in common.

Able would now own a 50% separate interest in Blackacre and Charles would have a 50% separate interest in Blackacre.

Right to Partition

Any joint tenant or tenant in common may bring an equitable action for partition. The court will either divide the property or order the sale of the property. A partition will be granted unless the right to a partition was waived.

Inkind

An partition inkind is when the court determines a dividing area on the property and draws a line to create two separate properties to divide between the parties. Physical division of the property is historically favored, though modernly it is unlikely to occur.

Blackacre is 10-acres and has a single-family home and a dairy barn on the property. The facts do not specify the exact location of these building, however the court may find it difficult to divide this property because they may have to split each building and give a portion to each party, which seems impracticable. The court may give each party one building to make it fair but because we do not know the size or value of each building, it is unlikely the court will divide the buildings between the parties. The location on the 10-acre property may cause placing a dividing property line to become difficult.

Although it is historically favored to order a partition in kind, it is unlikely in this instance the court will choose to do so.

Sale

A partition sale is when the court orders the property at issue to be sold and the profits distributed between the parties.

Because an in kind partition is unlikely to be ordered, the court has the option to order the sale of Blackacre. The profits would then be distributed to Able and Charles. If either Able or Charles brings an equitable action for partition, the sale of the property is likely to be ordered so that each party can get a portion of the proceeds and their dispute will be resolved.

It is likely a sale partition will be ordered for Blackacre.

Accounting

The court will account for the distributions of the sale profit by determining each party's interest in the property.

Since Able and Charles are tenants in common, they each own 50% separate interest. Because they each own 50% of Blackacre, the court will likely distribute the profits from the sale 50% to each party. The initial contributions to the purchase price of the property are not considered, because Able and Charles purchased the property as joint tenants and were given a 100% undivided interest in the property. When Able severed the joint tenancy, they both got a 50% separate interest as tenants in common. The court must also account for possible ousting or depletion of the property. Able may argue that he

was not allowed possession of the property because Charles lived there until David leased the property. This argument will not hold because the facts state Able never attempted to take possession of the property during Charles' or David's occupancy. This means that Charles did not refuse to permit Able equal occupancy or oust Able from his share of fair rental value of the premises. Able may argue that the farming done by Charles and David depleted the resources on the property. The court may order Charles to share the profits he made while farming on the property and the profits paid to him by David from farming on the property because Able has a right to those resources used by Charles and David.

Charles and Able would each receive 50% of the proceeds from the sale of Blackacre.

Payments/Reimbursements

The court may address issues of payments made and reimbursements.

The facts state that Charles was the only party paying for the property taxes for the initial 5 year period as joint tenants when he and then David lived in the property. Since both parties were equally 100% responsible for the property, Charles may recover half of the property taxes from Able because Able was also responsible for those property taxes. Charles also added a \$100,000 dairy barn onto the property. If Charles can prove to the court that this improvement was necessary, then the court may order Able to reimburse Charles for half of that payment. Able can also make a claim for the rent payments made by David to Charles. As an owner of the property, Able has a right to the rent payments even if Able did not know that there was a lease in place. Able can ask the court for half of the rent payments Charles received during David's 2-year lease.

but might be offset in case of property see p 1125 on the rent

if Able added value to the property recover without detriment to other owner must see portion of tax

Charles may be able to receive half of the property taxes from Able. Able may be able to receive half of the rent payments from Charles.

Overall Conclusion

Either Able or Charles may bring an action for partition and it is likely the court will order a sale partition. Charles may be able to receive half of the property taxes from Able. Able may be able to receive half of the rent payments from Charles.

2. What remedies does Able have regarding David's occupation of Blackacre?

Right to Lease

Both owners of a property have the right to lease the property regardless of knowledge of the lease by the other owner.

When Charles leased the property to David for a 2-year period, Charles had the right to do so. Able did not have any rights to prevent or remove David from leasing the property because Charles has the right to lease. Because Charles renewed David's lease, Able has no remedy against David to prevent him from leasing the property. David does not have a duty to pay rent to Able if he is paying rent to Charles absent an ouster.

Able's only remedy is to ask the court for half of the rent payments that Charles receives from David.

Also A could attempt entry & if D refuses then A could seek ejectment from D directly - sec 474 of land

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2)

Easements

An easement is a nonpossessory right to use the land of another.

Adam owns Whiteacre, Oscar owns Blackacre

A. Type of easement

There are two types of easements that exist, appurtenant easements and easements in gross. An appurtenant easement benefits a particular property, where an easement in gross benefits only an individual. The facts state that Adam called Oscar and requested personal permission to drive across Blackacre to get to the road. While this may seem to be an appurtenant easement, the facts state that Whiteacre is already adjacent to a public road and the granted easement was for land "along the fenceline" dividing the two properties. It is not clear what type of easement was intended to be created, if at all. If it is determined to be an appurtenant easement, Whiteacre would be the Dominant Estate, and Blackacre would be the Servient Estate.

B. Creation of easement

An enforceable easement may be created by the following manners: express, necessity, prescription, implication from prior use, and estoppel.

1. Estoppel

In 2001 and in 2020, Oscar and Adam entered into oral agreements to let Adam use Oscar's land to get to the road. Instead, Adam may argue that on both occurrences an easement was created by estoppel, where he relied upon oral permission to use Blackacre to his detriment. However, only the first agreement had clear terms. After Oscar built a

fence and fully blocked it in 2020, Adam stopped traveling across Blackacre. Adam will likely be unable to prove detrimental reliance without additional facts showing specific damages he incurred after Oscar blocked the access way.

↳ reliance

2. Implication from prior use

In 2010, Oscar confronted Adam about his use of Blackacre, and attempted to revoke the permission. Now, Adam may attempt to argue that he is entitled to an easement by implication from prior use. Unfortunately, one of the requirements for this is that both properties were derived from one parcel with common ownership. The facts state that at the time Oscar purchased Blackacre from Xavier, Adam already owned Whiteacre. There is also no mention of a pre-existing easement between Adam and Xavier. Adam is therefore not entitled to an easement by implication from prior use. ✓

3. Necessity

The existence of a public road adjacent to Whiteacre also eliminates the possibility of an easement by necessity.

4. Express

In 2020, Adam may argue that Oscar granted him an express easement. However, the document fails to satisfy the Statute of Frauds which is required for all agreements involving an interest in land. The statute of frauds requires both parties to sign the document. Since Oscar did not sign the deed, the easement will not be enforceable.

5. Prescription

Adam may argue that he is entitled to an easement by prescription. The elements of prescriptive easements are similar to adverse possession, requiring the following use of

the land: actual, hostile, open and notorious, and continuous. This jurisdiction has a 5 year statute of limitations. even though Adam had been using the property for 19 years, he had consent to use Blackacre until 2010, when Oscar told Adam he was never allowed on Blackacre again. However, Adam may assert that his use of Blackacre beyond the scope of the consent should be considered hostile. Adam's driving across Blackacre was also actual use, and a "weekly basis" would likely satisfy continuous use. Adam's biggest hurdle will be convincing the court that his use was open and notorious. While Adam may allege that Oscar neglected his duty to inspect the property at reasonable intervals after purchasing the property, Oscar can assert that this is not the correct standard to use in determining open and notorious in this case. Since Blackacre is a 100+ parcel undeveloped land, there are two problems. First it is not feasible to thoroughly inspect it, and second, a dirt road across the middle of the property is probably not visibly apparent from the public street, or could be obscured by trees or natural topography of the parcel. Consent also reappears as an issue in 2020 when Adam and Oscar re-negotiate an area on Blackacre he can drive on. This seems to further muddy Adam's argument of claiming an easement by prescription at this time. - how

6. Oscar's remedy for excessive use

— keep in mind this supports the prescriptive easement theory

If Adam prevails on showing an initial easement by estoppel originating in 2001, Oscar would be able to sue to excessive use to prevent Adam from using the access way through the middle of Blackacre, and recover for potential damages. However, Adam's misuse of an easement is insufficient to terminate it. If the access path severely damaged the servient land, it could result in a termination of the easement by destruction. However, the court is unlikely to apply that theory here when it is a seemingly natural consequence of use.

7. Adam stopped traveling across Blackacre

When Adam stopped traveling across Blackacre, Oscar may argue that this equated to abandonment of an easement. However, the standard for abandonment requires a physical act of intent to abandon. Adams words in re-negotiation to use Blackacre are also insufficient to show abandonment. Finally, because this didn't happen until after Oscar completely blocked the access point, he likely will not be able to prove abandonment of the easement.

8. Summary

In all, Adam will likely not prevail on showing an easement under any theory, and Oscar will be entitled to damages to his property to restore the dirt road to the state it was prior to Adam's misuse. While adam may have qualified for an easement by prescription at the beginning of 2020, his subsequent actions after the fact may constitute abandonment.

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3)

Question 3

What rights and remedies to Adam and Chicken Town have against one another under the doctrine of nuisance?

Nuisance

Nuisance is defined as a substantial and unreasonable activity by a landowner that significantly interferes with the use or enjoyment of another's property.

Nuisance per se

A nuisance that violates an existing statute is called a nuisance per se.

When Chickentown began constructing the the large, industrial chicken houses that produced the strong odor and health concerns Adam raises, they did so as allowed under the zoning and permit requirements they obtained, so Adam's claim would not be considered nuisance per se.

Public Nuisance

A nuisance that affects the health, safety or enjoyment of use of land for more than one person is referred to as a public nuisance.

Because the facts tell us Adam's wife and children barely noticed the strong odor from the chicken farm when they visited the construction site, it can be presumed unlikely that

other people farther away from the construction site are affected by the smell. Both Blackacre and Whiteacre are country properties, so they are likely removed from the close quarters of the public. Adam's additional concern about his unusual allergic reaction is unique to him. In light of these considerations, Adam's claim is not likely to be considered a public nuisance.

Private nuisance

A nuisance that violates an individual's right to quiet enjoyment of his or her land is referred to as a private nuisance. Here, Adam is upset about the chicken farming because while on his property he smells chicken odors and experiences windblown manure dust that causes him personal health issues. It is likely that Adam is raising a private nuisance claim.

Standing

To sue for private nuisance, standing is required. Only an individual whose personal use or enjoyment of their property is harmed may bring an action. They have to have a property interest in the land of either ownership or tenancy. Here, Adam is the owner of Blackacre, so he has standing to raise a private nuisance claim.

Adam v Chicken Town

In arguing a private nuisance claim against Chicken Town, one of the factors Adam will probably want to focus on is the rapid expansion from 300 chickens to over 100,000 under the change of ownership.

This dramatic increase brought with it the change of a small, local country chicken farm to an industry sized operation that undoubtedly brought with it substantially more noise from both the volume of chickens and sounds of commerce from the increased

production and shipping. If there was a 333% increase in the number of chickens, this means there was a 333% increase in the odor and manure dust as well.

Adam can present the fact that when he purchased Blackacre, it was after consideration and acceptance of the fact that Whiteacre was a small chicken farm that hosted only 300 chickens. Whiteacre is a ten acre parcel, so 300 chickens would not make a significant impact on the property.

Even if he had not yet constructed his house at the time Whiteacre was sold to Chicken Town and the offensive change took place, the purchase of Blackacre property was in itself an investment - one he made while relying on the facts that Whiteacre was a small chicken farm. This investment was amplified beyond monetary considerations as he has a family to consider.

Adam may wish to argue that rapid, unexpected, and undesirable change to the Whiteacre property significantly decreased the property value of his land, because surely many other reasonable people like himself would smell the odor, experience the manure dust, and be both offended and unable to enjoy the property.

Adam may also highlight that while Whiteacre is a ten acre parcel, his Blackacre is only one acre. There is not a lot of space for him to take remedial measures of relocating on his property to be farther away from the odor and manure dust.

If Chicken Town raises the defense that Adam came to the nuisance because he knew, or should have known, that Whiteacre was zoned as a chicken farm before purchasing Blackacre, Adam will probably want to present the unfairness of the implied understanding that Whiteacre was going to operate a small chicken farm, and the harm he has suffered by relying on that implied understanding.

In Chicken Town's nuisance claim against Adam for the loss of egg production due to his consistently shining bright lights at the Whiteacre chickens, Adam may wish to counter, and perhaps bring in an expert witness to testify, that anyone who has chickens knows that bright lights don't actually adversely affect them. Chickens by nature sleep when they are programmed to sleep and wake when they are programmed to wake and rarely do external circumstances cause any variance in this.

Adam can present the evidence that scientifically speaking, egg production in chickens is actually stimulated by light, and this is why many big business chicken industries purposely shine lights on their chickens during the winter months when chickens normally stop laying, so they will continue to produce eggs during this time. In presenting this information to the court, Adam may wish to conclude that there must be another reason egg production dropped, and regardless of his motive for shining the lights, the fact of the matter is that it is not objectively an activity that causes any harm to chickens, their egg production, or Whiteacre, so it does not meet the elements of a private nuisance.

Chicken Town vs. Adam

Probably the strongest argument Chicken Town will want to present is that they are within their lawful right to farm 100,000 chickens because Whiteacre is zoned to farm up to 300,000, and Adam would or should have known that when purchasing Blackacre.

They can highlight that they are technically only operating at 1/3 of their zoned capacity. Chicken Town would do well to bring up how very carefully zoning laws are analyzed and created, and that in Adam's private nuisance claim there is one man suggesting there was an error in the zoning code that was created by those who are trained and knowledgeable about the subject.

Chicken Town will want to assert their own private nuisance claim against Adam. They will want to establish that by setting up bright lights on Blackacre that shined directly on the chicken houses on Whiteacre at night, causing the chickens to become agitated, egg laying to stop, and revenue to be lost, Adam substantial and unreasonable activity interfered with the use of Whiteacre.

Chicken Town can remind the court that the entire purpose for purchasing Whiteacre was to farm chickens, and this purpose has been substantially undermined by the loss of egg production. They will want to highlight that they are a law abiding business that pays taxes and provides employment for local community members, as well as fresh eggs.

Finally, Chicken Town may point out that at the time Adam was affected by the windblown dust, he was outside on the construction site because his house had not yet been built, but that once inside, both the smell and dust would not affect him as much.

Court Considerations

It is likely that in considering the nuisance claims of both Adam and Chicken Town the court will work from the fact that Whiteacre is lawfully zoned to farm the amount of chickens currently residing there, and that even if Adam relied on the implied fact that Whiteacre would be a small chicken farm, it should have been foreseeable to him that the number of chickens could increase in light of the zoning license. Adam had no reason to believe Bob and his farm would reside on Whiteacre for any established period of time.

This objective fact will put almost of all of Adam's claims at a disadvantage from the beginning. While Adam may be able to establish that Chicken Farm as a neighbor presents a substantial and unreasonable interference to him personally in the use of his property, he will have a difficult undertaking in persuading the court that most reasonable would be similarly affected.

Balancing Test

However, when evaluating nuisance claims in which no party is doing anything technically unlawful, as is the case here with both Chicken Town and Adam's behavior, courts will want to measure the social utility vs. the gravity of harm. In Adam's claim against Chicken Town they may consider whether or not the social utility of a lawful, tax and employment generating business that provides a healthy food source for it's community is outweighed by the gravity of harm to Adam health and well being. They might consider the hardship to Adam in investing in a property, seeking to build a home and raise a family on it, only to discover afterwards that he would suffer health effects and lose value on his home because most people people would not care to live next to a large chicken farming industry.

In considering Chicken Town's claim against Adam, the court may want to evaluate whether the social benefit of granting relief to Adam and his family in what is objectively a hardship to them vs the gravity of the loss of business and revenue to Chicken Town.

In doing so, the court will want to look beyond just the immediate parties of Adam and Chicken Town and consider the potential collateral effects or precedent their ruling might have. If the court grants relief to Chicken Town, it may send an emboldening message to big businesses that the climate is changing in terms of private citizens being able to assert rights against commercial business, and open the door to industry oversteps, pushing back the lines of what constitutes a violation.

If the court grants relief to Adam, it may send the message to potential investors that perhaps the town in which Blackacre and Whiteacre resides is not one they would want to bring their business.

Conclusion

It is probable, based on the facts, that a court would find Adam does not have a valid claim against Chicken Town for the strong odor and chicken manure dust that is created by the Chicken Town, because Chicken Town is operating lawfully, and Adam should have foreseen that the size of the chicken farm could increase at any time. The court will also likely find that the elements of a private nuisance is not met because they interference is unique to Adam.

It is also probable that a court will find that Adam is liable for private nuisance for shining the lights on the chickens, scientific testimony aside, because the action is in itself substantial (it happens every night) and unreasonable (most people would consider it offensive). It is likely in conducting the balancing test of social utility vs gravity of harm that a court would find the benefit of relieving Adam from hardship is outweighed by the gravity of closing a lawful and productive business.

JS

END OF EXAM

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Adam may also highlight that while Whiteacre is a ten acre parcel, his Blackacre is only one acre. There is not a lot of space for him to take remedial measures of relocating on his property to be farther away from the odor and manure dust.

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In Chicken Town's nuisance claim against Adam for the loss of egg production due to his consistently shining bright lights at the Whiteacre chickens, Adam may wish to counter, and perhaps bring in an expert witness to testify, that anyone who has chickens knows that bright lights don't actually adversely affect them. Chickens by nature sleep when they are programmed to sleep and wake when they are programmed to wake and rarely do external circumstances cause any variance in this.

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They can highlight that they are technically only operating at 1/3 of their zoned capacity. Chicken Town would do well to bring up how very carefully zoning laws are analyzed and created, and that in Adam's private nuisance claim there is one man suggesting there was an error in the zoning code that was created by those who are trained and knowledgeable about the subject.

Chicken Town will want to assert their own private nuisance claim against Adam. They will want to establish that by setting up bright lights on Blackacre that shined directly on the chicken houses on Whiteacre at night, causing the chickens to become agitated, egg laying to stop, and revenue to be lost, Adam substantial and unreasonable activity interfered with the use of Whiteacre.

Chicken Town can remind the court that the entire purpose for purchasing Whiteacre was to farm chickens, and this purpose has been substantially undermined by the loss of egg production. They will want to highlight that they are a law abiding business that pays taxes and provides employment for local community members, as well as fresh eggs.

Finally, Chicken Town may point out that at the time Adam was affected by the windblown dust, he was outside on the construction site because his house had not yet been built, but that once inside, both the smell and dust would not affect him as much.

Court Considerations

It is likely that in considering the nuisance claims of both Adam and Chicken Town the court will work from the fact that Whiteacre is lawfully zoned to farm the amount of chickens currently residing there, and that even if Adam relied on the implied fact that Whiteacre would be a small chicken farm, it should have been foreseeable to him that the number of chickens could increase in light of the zoning license. Adam had no reason to believe Bob and his farm would reside on Whiteacre for any established period of time.

This objective fact will put almost of all of Adam's claims at a disadvantage from the beginning. While Adam may be able to establish that Chicken Farm as a neighbor presents a substantial and unreasonable interference to him personally in the use of his property, he will have a difficult undertaking in persuading the court that most reasonable would be similarly affected.

Balancing Test

However, when evaluating nuisance claims in which no party is doing anything technically unlawful, as is the case here with both Chicken Town and Adam's behavior, courts will want to measure the social utility vs. the gravity of harm. In Adam's claim against Chicken Town they may consider whether or not the social utility of a lawful, tax and employment generating business that provides a healthy food source for it's community is outweighed by the gravity of harm to Adam health and well being. They might consider the hardship to Adam in investing in a property, seeking to build a home and raise a family on it, only to discover afterwards that he would suffer health effects and lose value on his home because most people people would not care to live next to a large chicken farming industry.

In considering Chicken Town's claim against Adam, the court may want to evaluate whether the social benefit of granting relief to Adam and his family in what is objectively a hardship to them vs the gravity of the loss of business and revenue to Chicken Town.

In doing so, the court will want to look beyond just the immediate parties of Adam and Chicken Town and consider the potential collateral effects or precedent their ruling might have. If the court grants relief to Chicken Town, it may send an emboldening message to big businesses that the climate is changing in terms of private citizens being able to assert rights against commercial business, and open the door to industry oversteps, pushing back the lines of what constitutes a violation.

If the court grants relief to Adam, it may send the message to potential investors that perhaps the town in which Blackacre and Whiteacre resides is not one they would want to bring their business.

Conclusion

It is probable, based on the facts, that a court would find Adam does not have a valid claim against Chicken Town for the strong odor and chicken manure dust that is created by the Chicken Town, because Chicken Town is operating lawfully, and Adam should have foreseen that the size of the chicken farm could increase at any time. The court will also likely find that the elements of a private nuisance is not met because they interference is unique to Adam.

It is also probable that a court will find that Adam is liable for private nuisance for shining the lights on the chickens, scientific testimony aside, because the action is in itself substantial (it happens every night) and unreasonable (most people would consider it offensive). It is likely in conducting the balancing test of social utility vs gravity of harm that a court would find the benefit of relieving Adam from hardship is outweighed by the gravity of closing a lawful and productive business.

JS

END OF EXAM

PROPERTY
Professor Justin O'Connell
Final, Spring 2021
Question 1 – Answer Outline

Able and Charles

JT – modernly no need to state w/r/o/s

JT – presumptively 50/50 absent agreement

Clear and convincing evidence to rebut

Likely insufficient evidence to rebut

Each owner has right to possession

Severance of JT- modern rule unilateral severance is OK

No change in % ownership merely due to severance

No indication Able was ousted

Either may seek partition

In kind – historically favored but modernly impracticable in many instances

By sale

Accounting in partition proceeding

Charles shares in income except to extent used for carrying costs

Charles not liable for rent for his own occupation

Equitable allocation of reimbursements

Able re. David

Each owner has the right to lease property

Able has no claim against David

Able may seek accounting from Charles

Able may retake possession at end of David's lease

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Question 2 – Answer Outline

No easement implied by prior use

No common ownership resulting in severance

No prior use anyway

No easement by necessity

No common ownership resulting in severance

No issue with lack of access

License

Permissive use

Was permissive use exceeded

Intent – as fence line a determinative issue

Wandering through the rest of the property really not permissive

Reaction once discovered – anger – inferred fence line really meant fence line

Prescriptive easement

Actual – work away drive way

Hostile – to the extent deviated from permissive path

Open / Notorious – readily observable when owner returned

Continuous – yes

Termination – did not occur – when owner visited in 2010 easement had been perfected – owner can't terminate orally

2020 – building fence – began termination by prescription

2021 – time period had not run to terminate by prescription.

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Question 3 – Answer Outline

Adam V. Chicken Town

Rule: substantial and unreasonable interference with use

Analysis:

Two approaches:

Balance social utility vs gravity of harm.

Negligence

Substantial

Intensification of use

Likelihood of smell/odor

Intentional act of CT (even if unintended consequences)

Uncontrollable drifting of particulates

Under these circumstance is it substantial if it is barely noticeable to some – is Adam ultra-sensitive

Objectively standard as to proximity being offensive to ethics fails

Unreasonable

Reasonable person would find smell / dust offensive

Is Adam ultra-sensitive

Could CT take measures to control smell / dust

CT is legally operating – no claim of nuisance per se

Zoning and permitting contemplate CT's use

Remedies – prelim inj., perm inj., damages

Chicken Town v. Adam

Balance social utility vs gravity of harm.

Note – not negligence because activity is purposefully directed toward intended result

Substantial

Direct, immediate causation of disruption in egg production

Egg production is source of revenue, which dropped

Unreasonable

Little social utility in Adam's actions

Adam is not abating a nuisance – causing economic harm

May appear retaliatory – spiteful

Remedies – prelim inj., perm inj., damages