

SAN LUIS OBISPO COLLEGE OF LAW

REAL PROPERTY

Midterm Examination

Fall 2019

Prof. C. Lewi

Instructions:

There are three (3) questions in this examination. You will be given three (3) 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.

REAL PROPERTY
Professor Christopher C. Lewi
SLO College of Law
Midterm, Fall 2019
Question 1

Tom rents Greenacre, a farm with a house and fields and barns and storage facilities, for a term of 5 years for \$24,000/yr, payable on the first of every month at \$2,000/month. At the time he enters into the lease. Tom intends to live in the house on the farm and work the farm as his primary business growing cannabis, all of which Larry knows and agrees to in the lease. Tom has all the required permits and the cannabis grow is "legal."

The lease provides that at the end of the 5 year term, if Tom does not vacate the farm, the lease will rollover into a month-to-month lease at \$2,000/month rent, payable on the 1st of the month.

3 years into the lease, cannabis has not kept its promise as the crop of the future and Tom begins to run late on his monthly payments; Larry accepts payment of the next three (3) month's rent on the 15th, not the 1st. Larry begins to grow concerned that Tom will not be able to make rent. The next month, Tom does not pay on the 1st, and on the 2nd, Larry delivers to Tom with a 3-Day Notice to Pay the \$2,000 owed in Rent; Tom does not pay the rent and on the 6th, Larry files an unlawful detainer suit to evict Tom and recover all rent owed, plus costs and attorney's fees.

Tom is properly served with the lawsuit and in defense asserts that the farm had some problems:

(1) that the barn doors did not close properly, which caused Tom's cannabis to not dry properly and therefore cost Tom \$10,000 in lost profits;

(2) that the soil in the fields had pockets of "toxic hot spots", the remains on an old mercury mine on the property operated long before Larry's owned Greenacre, and that such hot spots resulted in Tom not being able to grow as much cannabis as he thought he was going to be able to grow at lost profits of \$25,000; and,

(3) that the hot-water heater in the farmhouse repeatedly failed to work and that despite repeated requests from Tom, Larry did not fix it, and that Tom did in the amount of \$1,500.

The case goes to trial here in California. Please discuss the most reasonably likely outcome(s).

.....
Discussion outline:

1. Commercial or residential lease?
 - a. Mixed
 - i. Farm house is residential
 - ii. Rest of farm is commercial
2. Tom must pay rent
 - a. Tenants must pay rent to landlord
 - i. This is the essential condition of tenancy
 - b. Rent must be timely unless excused
 - i. Not excused here on the facts.
3. Was 3 Day Notice proper?
 - a. Arguably it was premature because Larry, by his conduct in accepting late payments for the prior 3 months, had modified the due date for the monthly rental payments to the 15th.
 - b. We do not have evidence of it, but lease contracts often have a clause that allows L to accept late rent without a waiver of rights to demand timely payment on the due date set forth in the lease.
 - c. If Court deems 3 Day Notice premature, Tom will win (for now) and he will not be evicted until and unless Larry starts again with the process.
 - d. Assuming 3 Day Notice was proper and there is no finding of modification of the due date
4. Defenses to Rent Claim
 - a. Warranty of Habitability
 - i. Only applies to residential leases
 1. Was this a residential lease?
 2. Was this a commercial lease?
 - ii. Farmhouse was Tom's residence and better analysis is that the lease was "residential" at least to the farmhouse.
 - iii. Water heater is the type of core requirement of habitability that a landlord must provide and maintain for tenant.
 - iv. Remedy is offset of the \$1500 repair cost (assuming that is reasonable) against the claim for the \$2000 rent owed
 1. Court has discretion to require Tom to pay the reduced \$500 rent and thereby not evict Tom if Tom pays that amount in X days.
5. Barn Doors and Toxic Spots in Fields
 - a. These claims are not encompassed by the WHO because not attached to a residence.
 - b. Covenant of Quiet Enjoyment (Nt. 1, pg 528):
 - i. "In every lease there is an implied covenant that the T shall have the right of possession, occupancy, and beneficial use of every portion of the leased premises"

- ii. Text states that this covenant, whether express in lease or implied by law, imposes on landlord a duty to provide suitable premises. (pg 529, bottom).
 - c. Not really a defense to an eviction case for failure to pay rent
 - d. Rather, Tom has causes of action for damages in contract for the \$10,000 and \$25,000.
- 6. Extra Points: Prevailing party will get attorneys' fees under the lease
 - a. Who is prevailing party?
 - b. Result is a push
 - c. Looking for answer that recognizes that there may not be a prevailing party and therefore no atty fees award.

REAL PROPERTY
Professor Christopher C. Lewi
SLO College of Law
Midterm, Fall 2019
Question 2

Greenacre is a tract of 100 acres owned by Obe in fee simple. Obe executes a deed conveying Greenacre to Ann in fee simple. Obe put the deed in a drawer in his desk. Subsequently, Obe dies. Obe's will states: "I leave all of my real and personal property to Blake." Blake lives in another state and does not seek to occupy or otherwise make use of Greenacre. Blake does not grant permission to anyone to enter or to use Greenacre.

Shortly after Obe's death, Ann discovers the deed in Obe's desk. Ann is not aware of the provisions of Obe's will. There is a house on Greenacre, which sits inside a fenced area of five acres. Beginning in Year 1, Ann enters Greenacre and takes up residence in the house. Ann maintains the house and the five-acre fenced area, but does nothing with the rest of Greenacre.

Ann kept the deed in the same desk drawer where Obe left it. Ann resides in the house for 10 years, then dies. During those ten years, Blake was incarcerated for four years. Ann's will provides: "I leave all of my interest in any real property to Clair." Clair immediately moves into the house on Greenacre and lives there for another 6 years before Blake discovered Clair was living in the house on Greenacre and filed a lawsuit against Clair. In the relevant jurisdiction, the time period that needs to run in order to perfect an adverse possession claim is 15 years; there is no requirement that the adverse possessor pay property taxes.

Question

1. What interest, if any, does Clair have in Greenacre? Explain.

.....

Discussion outline:

Depends on whether Blake's incarceration tolled the AP SOL.

1. Obe to Ann - Deed / gift: A deed may validly convey real property by inter vivos gift so long: (i) donative intent, (ii) delivery, and (iii) acceptance. Was the deed delivered; i.e., in common area / somewhere Ann would find it?
 - a. Is deed a will substitute and effective on O's death? NO; not witnessed by two persons as required by Statute of Wills
2. Better answer that the deed was not "delivered" and therefore ineffective.
 - a. *Rosengrant v. Rosengrant* (OK 1981) (pg 612-616) analogous.
3. Obe to Blake - Devise: would take FSA unless lesser estate is intended.

4. Ann's AP: Ann occupies 5 / 100 acres; (i) an actual entry giving exclusive possession that is (ii) open and notorious, (iii) adverse (hostile), and (iv) continuous throughout the statutory period.
 - a. AP elements satisfied except for the time period
5. Clair's AP: Tacking SOL, privity with predecessor
6. Blake's disability: Tolling during 4 years of incarceration?
 - a. When was Blake in jail? At beginning of the AP period or after it began to run? If at beginning, then SOL tolled for at most the 4 years; if not, no tolling.
 - i. CCP 328.5
 1. *Rumie v. Martinus*, 2006 Cal. App. Unpub. LEXIS 1044, *16
 2. Tolling for imprisonment only applies of the person claiming the benefit of the tolling statute was imprisoned at the time title was first acquired or obtained, and then tolling only for 2 years
 - b. If we presume that Blake was in jail at time of O's death, then any AP claim will be tolled for 4 years (2 years in California) and Claire will not satisfy the 15 year continuous possession rule of the jdx (10 years + 6 years - 4 years = 12 years.)
 - c. But, if we presume that Blake was incarcerated at some point after O's death, no tolling and Clair will have satisfied the 15 years (10 years + 6 years = 16 years.)
 - i. Tacking OK.
7. Ann's devise to Clair: Any interest to devise? Operates as privity for purposes of tacking.
 - a. Tacking is permitted if successive occupants are in privity, and they are in privity if there is a *voluntary* transfer of either an *estate* or *possession* from one occupant to another

REAL PROPERTY Professor
Christopher C. Lewi SLO
College of Law
Midterm, Fall 2019
Question 3

A student is writing a report for science class and uses copyright images downloaded from the internet and cited correctly. He submits his project to a competition that recognizes classroom work for students and wins a prize for the school. Several weeks later, the student receives "cease and desist" letter from Big City Law firm, stating that Student has infringed on the copyrighted images and demanding that Student immediately withdraw his project and stop using the images.

You work as a first year associate at Small Town law firm, which has been retained to represent and counsel the Student as to whether they should withdraw the project.

Please draft Your memo.



ANSWER Outline

1. The question tells us that the images are copyrighted so we do not need to go into that.
2. Infringement:

If one improperly uses a copyrighted work, that is called "Infringement" (pg 147, nt 5.)
 - o Copyright holder must prove:
 - (1) an actual opportunity to copy the original work (i.e., access to it); and
 - (2) that the original work and the allegedly infringing work "share enough unique features to give rise to a breach of the duty not to copy."
3. Defense to an Infringement Claim – Fair Use Rule
 - o As the court explains, fair use has a long historic pedigree and first arose as a common law limit on copyright. Fair use is now codified in section 107 of the Copyright Act. Under section 107, a court considering the fair use defense is to consider

- (1) the purpose and character of the use
 - Commercial use can be fair use
 - Non-commercial use can be fair use (see pg 159, nt 2)
- (2) the nature of the copyrighted work,
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole,
 - quality and quantity count
- (4) the effect of the use upon the potential market for the value of the copyrighted work. (Page 151).
- The fair use test is very much a standard rather than a bright-line rule. The court emphasizes that the courts are to weigh each factor, though not in isolation from each other.
- It is worth asking students to think about why each of the fair use questions is relevant and what purpose Congress and the courts are seeking to further by creating a fair use defense. Here the connection between the Constitutional text (mentioned on page 150) and the statute may be helpful.
 - Copyright is designed to further First Amendment interests by promoting the creation of expressive content. But while making the copyright monopoly super strong would encourage some authors to create, it would also inhibit a lot of creativity. As the Newton quote that will appear on page 178 suggests, innovation is cumulative. The films of Jean-Luc Godard and Akira Kurosawa influenced directors like Quentin Tarantino, who in turn influenced younger directors like Christopher Nolan.
 - Creative work begets more creative work, and the copyright system wants to prevent wholesale copying while also permitting creators to be inspired by those who came before without having to secure the earlier creators' permission to take their ideas in new directions. The first director to use tracking shots or flashbacks does not get to monopolize those techniques.
 - Relatedly, copyright law wants to let criticism flourish. Suppose you write a law review article with which lots of people disagree. Now suppose, counterfactually of course, that they are right to be critical. People want to attack your view by quoting from your article.
 - But now suppose they needed your permission in order to do that, and you don't want to give them such permission because their criticism might embarrass you. As a result, more people would believe things that aren't true. Fair use – along with the idea / expression dichotomy – help ensure that these socially beneficial kinds of borrowing or critiquing are protected.
 - alleged infringers of non-fiction works are much more likely to prevail when asserting the fair use defense than alleged infringers of fictitious works.

Better answer here is that while Student may have infringed on the copyright, it was fair use for a non-profit, school project and that type of use is to be encouraged, particularly if we

presume that the imaged were "non-fiction".

1)

1. Barn Door Close Properly, lost \$10k in profits

Tom has a tenancy for a term of 5 years from Larry for a property with a house, fields, barn and storage facilities. The first point of contention is whether this a residential or commercial lease. Residential leases have more protections such as a warranty of habitability, whereas a commercial lease does not. The fact pattern states that Tom plans to grow marijuana legally there, so this could imply that it is a commercial lease, however, there is a home on the lease that Tom will be living in, which implies a residential lease. Here, because he is living at the home, the it is likely that at least the home is covered under residential tenancy, and warrant of habitability would apply. If the doors of the house would not close properly, L would have a duty to fix, but since it is the barn door that isn't working, that's probably not covered under habitability. Most property's do not have barns, and it is hardly necessary like other habitability requirements like running water, heat, doors that lock and work properly. Unless their lease contract states that the landlord is responsible for the upkeep of the barn, it is likely not L's responsibility and L would not be liable for the lost \$10k in profits.

2. Toxic Spots affecting marijuana growth

This appears to be a similar issue as the barn door. It is not a landlord's responsibility to ensure that every aspect of their land is perfect for every possible use it might be put to. Unless their lease contract stated that the land was suitable for growing crops and that it had no soil toxicity guarantee's it is likely that L is not responsible for T's lost profits due to the substandard soil. The mercury toxicity could be a habitability issue if it affects the health of the person living there, or contaminated the drinking water, but there is no evidence of that here.

Also if the contract states that the L is proving a house and farmland and that the farmland is suitable for growing crops, L may be liable for damages if he explicitly or impliedly represented that the land was suitable for farming and he had knowledge that the soil was contaminated by mercury hot-spots. This is dependent on whether L had knowledge and what the terms of the contract were in regards to the use of the land for farming. It does state that it was from an old mine on the property operated long before L owned Greenacre but it doesn't state whether he knew about it.

3. The hot-water heater in the farmhouse failed to work, despite requests from T to L that he fix it

A functioning hot water heater is one of the duties that a landlord has to their tenant, as long as it is for the house. If the hot-water heater were separate and only for use in the farm, that would not be an integral component of habitability and L would not be required to keep it in working order. Again, these would have to be spelled out in the lease agreement, but if it is necessary for the house, T is responsible.

Also, if it was for just the barn and the contract made no mention of it, the landlord may have an implied duty to maintain if it was functioning when the tenant moved in and it was understood by both that he would be using it.

It does state that T repeatedly asked L to fix it but L did not fix. Even if it is outside of the requirements for habitability, L should have told T that he was not required to fix it or that he would fix it. However, since L didn't fix it or tell T not to fix it, T would be able to deduct the cost he paid for it to be fixed from his rent.

4. Late Payments

A contract can be changed by words, by written addendum or by conduct. Since Larry continued to accept T's payments made on the 15th instead of on the first for 3 months and did not tell him otherwise, this is implied consent to the changed date for payment and now T's payments are due on the 15th. L would not be able to evict T for failure to pay by the 2nd. Even if the date hadn't changed to the 15th, L would not be in his rights to require 3 days to pay or evict. Leases in which a tenant has been there less than a year require 30 days notice, for tenants that have been there beyond a year have a 60 day notice for eviction. However, just because T may have credible grievances, doesn't mean he doesn't have to pay. He must continue to pay rent, though he could deduct the \$1.5k he paid to fix the water heater from his rent. That's immaterial now since by the 6th of the month, T isn't even late on his rent payment since T has given implied consent to the change in payment day by accepting the rent on the 15th for 3 months in a row.

END OF EXAM

2)

Gift

In order for a gift to be valid there must be donative intent, delivery (either actual or constructive) and acceptance. Acceptance is presumed unless the facts suggest that it is denied.

Here it states that Obe (O) executed a deed conveying Greenacre to Ann (A) in fee simple. O then failed to deliver this deed to A, thus not meeting the requirements for a valid gift. O still owns Greenacre in fee simple absolute and A has nothing.

After O's death, his entire estate was willed to Blake.

Adverse Possession

Adverse possession is a doctrine that allows one in possession of land owned by another to gain title to that land. If the adverse possessor (AP) meets all the common law requirements for the statutory period of time, the AP can become the rightful owner and title holder. The requirements for adverse possession are actual, open and notorious, exclusive, hostile and continuous possession.

Actual possession is required to obtain title under adverse possession, however one can have constructive possession under claim/color of title.

Color of title

Color of title is where one has a writing, usually a deed and that deed says they have title to the land but that deed is wrong. Good faith in the deed is required and the deed holder may act in reliance of that deed. The deed holder will also be able to gain possession of the whole property listed in the deed regardless if they enclosed it or not.

Here A has a deed to Greenacre that she found in O's desk. She had no notice of O's will and that he left all his real and personal belongings to B. A had good faith that this deed, and thus Greenacre, was hers and she acted in reliance on that good faith and moved into the home on the property. The home part of the enclosed 5 acres but it will be possible for A to gain possession to the whole 100 acres under this color of title.

Open and notorious

Open and notorious possession is required to show the world, and most importantly the true owner, that someone is adversely possessing their land.

The facts state that A moved into the home year one and continued to care for and maintain the home and the fenced 5 acres. A possession is open and notorious.

Exclusive

the AP must possess the land exclusively, meaning they do not share the property with the greater public or the true owner.

The facts state that A lived in the home but are silent as to if she shared the home with anyone else. It will be presumed that she did not open the land up to public use therefor A will likely meet the requirements of exclusive possession

Hostile

Hostile possession means that the AP is using the property in a way that goes against the true owners interest. This does not mean that there needs to be a adversarial relationship. Any possession without permission is hostile

The facts state the B did not grant anyone permission to enter Greenacre, therefore A did not have B's permission to live in the home and maintain the 5 acres.

Continuous

The AP must adversely possess the property for the required statutory period of time in order to gain title to the property. This continuous use must be the type of use that the true owner would also use. Seasonal use would suffice if that is the best use for the property. Here the facts state that the statutory period is 15 years.

Tolling

The statute of limitations can be tolled (paused) if the true owner of the property is incapacitated, incarcerated or a minor at the time the AP entered the property.

A lived on Greenacre for 10 years before she died. B was incarcerated for 4 of those years, however, it does not say whether or not B was incarcerated at the time A entered the property. If B was incarcerated when A entered the property then the statute of limitations will toll until B got out of jail. If B became incarcerated after A had already entered Greenacre then his incarceration will be irrelevant and the statute of limitations will have started when A entered Greenacre. Because it does not say when B became incarcerated it will be presumed that he went to jail after A entered Greenacre and the statute of limitations did not toll.

A did not meet the statutory requirements to adverse possession before she died, 10 years after entering Greenacre.

After A's death C took up possession of Greenacre, as she inherited all of A's interest's.

Tacking

If the AP is not in continuous use of the property for the entire statutory period of time, it is possible for the AP to tack her time on to another's time if they are in **privity**. Privity means the prior possessor passed possession to the successive possessor by deed, will or intestacy.

Clair (C) immediately moved into Greenacre after A's death and because A and C are in privity, C can tack her 6 years onto A's 10 years to meet the statutory requirement of 15 years. C has met all the common law requirements for adverse possession.

Outcome

C's interest in Greenacre is that she has adversely possessed it from B, and is entitled to title of the entire 100 acre property under the color of title that she inherited from A

This I also know:

A never recorded her deed and the facts are silent as to whether C recorded. If Greenacre was located in a Race jurisdiction B could record title and regardless of his notice of C in possession could claim title to Greenacre.

END OF EXAM

3)

Memo re Student, copyright infringement.

Copyright overview

Copyright gives the owner the right to protect against reproduction, creation of derivative works, distribution, and displaying publicly or online. The student's use is displaying the images in a competition, which is a protected use for copyrighted items.

Public domain

It lasts for the life of the creator plus 70 years. While they can be transferred, that does not change the time frame (still life of the creator). Once that time is up, it cannot be renewed and will enter the public domain. First, it should be determined if the work is in the public domain. If it is, then they do not have copyright protection over it and it can be used by anyone in any manner.

What can be copyrighted?

It should be verified whether or not the copyright over the images is valid. In order to get a copyright, there must be originality, a work of authorship, and fixation.

Originality

There must be a modicum of creativity to meet the element of creativity. The images likely meet this if they were someone's original work.

A work of authorship

This includes: writings, music, images, architecture, dramatic pieces, etc. An image is covered by copyright law.

Fixation

The work of authorship must have a tangible format, for example, a book, CD, photograph, sculpture, etc. This images are fixated online.

There is likely a valid copyright over the work.

Copyright Infringement

In order for there to be a claim of copyright infringement, there must have been an opportunity to access the work and it must have been similar enough. This work was available online, where anyone could use it and the images were copied directly.

Defense of Fair Use

Since the student used a likely validly copyrighted item, his only likely defense is fair use. The elements of fair use are: purpose character of the use, nature of the use, quantity and quality, and effect on the market.

Purpose and character of the use

The purpose and character looks to whether the use was transformative. One example would be if it was it commercial or non-profit educational. Here, the student first used the images in a report for science class. This use is purely educational and at the time was just used in the classroom. However, the use at issue was when the project containing the images was then submitted to a competition and won a prize for the school. The school likely is non-profit, and no money went to the student directly. This use was partially transformative, the student likely did use the same images without modification, however they were part of an overall project that was likely judged in its entirety. These issues

Nature of the use

Works of fiction are more often protected under copyright than works of fact because copyright is meant to encourage creativity. The use was for a science project; depending on the project there may have been a different nature.

Quantity and quality

The student likely copied the images in their entirety. The fair use defense may still be applicable when the entirety of a work is copied; all the factors need to be balanced.

Effect on the market

This is the most important factor. It looks to if the works were in competition with each other. The student's use of the images likely did not interfere or compete with the sales of the image. It was used in a school setting and then in a competition that is limited to classroom work for students.

If the creator of the image was a student, then they may have been able to compete in the same competition, or have used it in their own school project, but that possibility aside, the creator could not have directly entered the same market that the student did due to age. The only way the creator could have entered that market would be to have sold the image to students participating the competition. Even then, he would not have been able to get the prize money that was earned. Most students would not purchase images when they could use other similar images online for free, so the owner likely would not make any sales from students. If the student's project ended up being posted online, it is not in competition with the creator's because the student is not currently getting any income from it beyond the competition. Actually, depending on how popular the competition was, more people may become aware of the creator's work than knew about it previously since it was cited and they may seek him out to purchase it. A court may also look to the fact that a student's use of an image would not discourage people from continuing to create new works, which is one of the purposes of copyright.

Questions to clarify

Did he modify the image in any manner? Likely not, but this would help his fair use defense.

Was the work in the public domain?

Was the student acting within the school's code of ethics and the competition's requirements? If so, they may be included in the issue.

Potential Outcome

The student does not have to withdraw the project. A defense of fair use would likely be successful because overall it is an educational use, and it had minimal (if any) effect on the market. While it did earn money, that money went to the school and was for the overall project.

However, the student should be advised that it would be costly to bring a case to court to fight the claim of copyright infringement, or even to hire Small Town Firm to settle with Big City Law. It would be prudent for him to comply with the cease and desist to avoid the legal costs.

END OF EXAM
