

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

QUESTION

Debbie purchased an ocean front vacation house located on Lot #1. Shortly thereafter Peter purchased the ocean front house located on adjoining Lot #2. The houses and lots are comparable in size, value and age.

After his purchase, Peter hired a surveyor to lay out the boundaries of Lot #2. The surveyor reported that a portion of the porch of Debbie's house is on Peter's property. In particular, her 10-foot wide porch extends laterally 7 feet onto Peter's property. The encroachment was made by the original developer 25 years before Debbie and Peter purchased the properties.

Six months after learning of the encroachment, Peter commenced an action to compel Debbie to remove the porch from his property.

- 1) How should the trial court rule on the merits of Peter's action? Discuss.
- 2) If the trial court issues a mandatory injunction requiring Debbie to have the porch removed within 30 days, but Debbie does not comply, what procedural steps should Peter take to make her comply and what should be the result? Discuss.
- 3) If the trial court concludes that Debbie willfully disobeyed the injunction and fines her \$1,000, but on Debbie's appeal the appellate court concludes that the injunction should not have issued, how should the appellate court rule on whether Debbie must pay the \$1,000 fine? Discuss.
- 4) If Peter had not commenced his action until one year after his discovery of the encroachment and Debbie had moved to dismiss the action because of this delay, how should the trial court rule? Discuss.

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

ANSWER A

This question involves possession and adverse possession of real property, and the remedy of injunction and its particularities.

1. How should the court rule on the merits of Peter's (P) action?

The merits of P's action cannot be fully determined given the lack of facts as to who owned the two lots in question prior to Debbie (D) and P purchasing them. Assuming that the developer sold both lots and the homes on them sometime shortly after development (a likely scenario) then the issue of whether D owns a portion of P's lot by adverse possession is paramount.

Adverse Possession: The owner of real property has the right to exclusive possession to the land and the right to exclude others among the bundle of sticks commonly contained in a landowner's rights.

The concept of adverse possession is designed to promote the productive use of land, and serves as a bar to a claim in ejectment or for trespass from the legal owner. It is possible to acquire title to land by adversely possessing it. The requirements are: open and continuous possession; exclusive possession; actual possession, notorious possession and possession in a manner hostile to the true owner. These acts must continue for the requisite statutory period.

Tacking of one adverse possessor's interest onto one who takes the land after them is usually allowed.

These facts indicate open and continuous possession of the 10 foot wide porch by 7 foot wide deep portion of Lot #2. D and all previous owners have unfurled their flag and let it fly by building a structure thereon. Given that there are no facts to support an inference that Lot #2 owners allowed this structure to exist with permission (creating a license rather than adverse possession) satisfies this requirement. The hostility requirement is also satisfied given the structure and the fact that it implies a claim of right as against all others to the land in question.

The final issue, that of possession for the statutory period is unclear. First, there is no indication what the statutory period is. Some states allow 10 years, others 20 - and most states also shorten these periods if adverse possession is under color of title (pursuant to a written instrument purporting to grant title). The color of title issue is not applicable here.

Assuming all these requirements are borne out by the law and the facts developed at trial, P would lose his claim and his title interest in the portion of Lot #2 in question.

If the AP is not satisfied D might also argue that she has an implied easement for the porch structure. There are numerous types of easements, including express easements by

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

grant or reservation (no facts to support); easements by prescription (see above); and implied easements including easements by necessity.

An easement is merely a right to use the land of another, and so while D would not get title she might claim an implied easement allowing her to use the land upon which the porch is built. This would be an implied easement for the porch if it was apparent, and continuous because it was apparently created by the original owner of all the land (the unitary tract requirement). It also appears to be reasonably necessary for D to enjoy the use of her land. This is fairly weak, however.

D could also argue that because of the fact that the developer owned both tracts, he may be said to have reserved a “porch easement” for himself. This might work if he built the porch on #1 and then sold #2, reserving the easement in some express manner. The facts do not support this.

Remedies: There are three basic types of remedies for torts: damages, restitution; and injunctions. When land is involved an injunction is often appropriate where legal money damages would be insufficient to make the P whole.

The requirements to grant an injunction are: the legal remedy must be inadequate; there must be a property interest at stake (although courts now extend this to important personal rights or interest); the injunction must be feasible in the sense that it does not require too much court supervision, and negative injunctions are thus preferred (an injunction requiring the enjoined party to refrain from encroaching, for example); the court will usually balance the hardships of the parties (with exceptions for intentional encroachment or public nuisances); and there must be no defenses available to make granting of the injunction inappropriate.

As noted, the legal remedy appears inadequate since land is involved and there encroachment is ongoing. A property interest (P’s interest in Lot #2) is involved. This injunction is feasible, as the court need only require D not to encroach on Lot #1 by requiring removal of the porch (it is arguable that this is really an affirmative injunction, e.g., remove your porch).

In terms of balancing hardships, it appears that the encroachment was not intentional, this requiring a balancing. The facts are unclear as to the cost to D to remove the porch, the usefulness of the land in question to P’s enjoyment of his lot and other such issues. It is quite possible that the court could find D’s hardship extreme, especially if it would require great expense. It may make more sense for a court to order D to pay P fair market value for the land being possessed (assuming the adverse possession claim has failed).

Defenses to the injunction will be discussed, infra.

2. What should P do if D does not comply with the courts order?

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

In the event D does not comply with the court's order regarding the removal of the porch, P should do a number of things. First, P should file a motion for D to show cause as to why the order is not being complied with. Failure of D to answer this motion in a timely manner should result in P seeking a contempt order against D. Contempt may be both civil and criminal in nature. Civil contempt occurs when the contemnor holds the keys to the jail in her own pocket - D must merely comply with the court order and avoid the contempt sanction. If criminal contempt is imposed, it is to punish a wrongdoer for past acts. Under some circumstances extra procedure must be allowed before levying of serious criminal contempt sanctions.

P might also seek a court order allowing him entry onto D's land to remove the porch, or to allow sheriff's officers to enter the land to assist in or keep the peace during such a situation. The court should find D in contempt.

3. How should the appellate court rule on the trial courts finding of a willful disobeying of the court ordered injunction?

The appellate court should apply the collateral bar rule to the contempt sanction even if they find the injunction was inappropriately issued. This rule requires one to comply with court orders regardless of whether they are perceived as being invalid under the law. Parties must abide by court orders despite any likelihood of success on appeal until such time as the trial court lifts its order or the appellate court overturns the order. In this case D failed to comply with the order, and was held in contempt via a \$1,000 fine. Her failure to abide by the court order allows the trial court to hold her in contempt in most situations.

While this rule preventing parties from ignoring court orders serves the positive public policy function of encouraging adherence to court rulings, it appears that this is one situation in which its application could be unjust. However, the appellate court should find that willful disobedience of an order, unaccompanied by a request for a stay from the trial court is appropriate. If D had a good faith basis for not complying she should have informed the trial court and requested a stay until the appeal was decided. Here she did nothing and remained silent.

4. Effect of P commencing the action one year after his discovery.

There are three main defenses to issuance of an injunction aside from hardships disproportionate to the requesting party's. These include unclean hands (in relation to the issue at bar); laches; 1st Amendment prior restraint concerns.

Here D appears to be offering the defense of laches to the injunction. It is an old maxim that equity aids the vigilant, and not those who slumber on their rights. In the main fact pattern P waited six months before filing his claim against D. Absent more facts it is hard to see how waiting another six months would hurt P. It is important to realize that this delay could affect P's claim vis-a-vis D's adverse possession claim based on the running of the statutory period. If his delay in filing the claim resulted in the period passing without his

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

filing the action, he would lose based on the statutory period as much as on his unexcused delay.

There are facts that, if hypothesized, do give rise to a laches defense by D. For example, if P had found out a year ago about the encroachment of D's porch on his lot, and D subsequently undertook improvements such as repairing the porch roof, redecking the porch, enclosing the porch with screens, or any other significant expenditure of time or money, at worst D would be entitled to compensation for any such improvements, at best for D she could be allowed to keep the porch by buying the small section of P's land from him for FMV. This would be particularly true were P to have known of D's improvements and stood idly by until such time as the work had been completed. This would actually be an excellent set of circumstances for D, even if the statutory period for adverse possession had not run, and indeed is the very sort of scenario calling for the judicious application of the doctrine of laches.

ANSWER B

1. Peter is bringing an action to get an injunction to make Debbie remove the porch from his property. His ability to receive an injunction will depend on who owns the land. Debbie may have acquired it through adverse possession. If not, the court will apply the injunction requirements to determine whether Peter is entitled to an injunction or merely damages.

Adverse Possession

Adverse Possession is a way of acquiring ownership of land that is not rightfully owned by the adverse possessor. It results from the statute of limitations on trespass claims. Here, Debbie will have acquired title to the portion of the land that her porch encroaches on if she can prove all elements of adverse possession.

Open & Notorious

The use or possession of the land must be open and notorious so that the rightful owner is put on notice that a trespass is occurring. Building or using a porch that encroaches onto another land would satisfy this requirement because it is visible to the owner. The rightful owner would have notice.

Actual & Exclusive Possession

The adverse possessor must actually possess the land. Here, building a porch is actual possession and use of that land.

The adverse possessor must also exclusively possess this land by not sharing it with the public or rightful owner of the land. Debbie and her predecessors in interest probably

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

did not share the porch with anyone except their own guests. Therefore, their use is actual and exclusive.

Continuous

The use must be continuous for the statutory period. Here, the porch was built and presumably used for 25 years. As long as the porch was in existence with the house, it was continuous use. Although Debbie herself did not continuously use it for 25 years, she can tack her interest on to the previous owners, if they also adversely possessed the land.

Statutory Period

The land must have been held adversely for 20 years (common law) - here it was held for 25 years which would satisfy the statutory period.

Adverse

On the facts we have, it is unclear whether Debbie's predecessors in interest held the land adversely. To be adverse, it must be without the true owner's permission. Since the original developer built the porch, it is unclear whether there was permission at that time. If so, then it would have to be held for 20 years by someone without permission, and we do not have the facts to determine this. Therefore, it is unclear whether Debbie held the land by adverse possession. If she does not, then Peter can apply for an injunction to remove the encroachment.

Injunction for Removal of the Porch

Peter will be able to get an injunction for the removal of the porch if he can show that damages are inadequate, a property right is involved, the enforcement is feasible, he wins if interests are balanced and there are no defenses to the action.

Inadequacy of Damages

Peter can only receive an injunction if damages would be inadequate. He can get money to compensate for the lost value, but because land is unique, he will not be fully compensated. Therefore, damages are inadequate.

Property Right

Although courts have broadened the definition of property rights, the plaintiff must still show that the issue involves property. Here, the issue is a porch, or real property, so this element is satisfied.

Feasibility

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

In order to issue an injunction, it must be feasible to enforce it and not involve too much court supervision. Here, the court could hold Debbie in contempt because she and the land are within the court's jurisdiction. Therefore, it is feasible for the court to enter an injunction.

Balancing the Hardship

In an encroachment case, the courts will usually balance the hardships between the plaintiff's interests and defendant's expenses in removing the encroachment. However, the courts will be more favorable to the plaintiff and will not balance at all if the defendant intentionally encroached on the land. Here, Debbie bought the house with the porch already attached, therefore, she did not intentionally encroach on Peter's land.

By balancing the hardships the courts will consider the great expense in removing a porch and loss in value to plaintiff's property. The court may find that a porch is easily removable compared to a solid structure. However, the costs to the plaintiff probably outweigh the benefit to the defendant of getting seven feet of his land back. He bought the land aware of the porch, even though he did not know it was on his land at the time. Therefore, the court will likely refuse to give the injunction and give money damages instead.

Defenses

Because an injunction is equitable relief, the court will not award it if the plaintiff was involved in wrongdoing or inequitable behavior. Debbie can say that Peter waited too long to bring suit so that laches applies. But six months is probably not too long. It is also unlikely that unclean hands applies because there is no indication that Peter acted wrongfully in regards to the porch. Therefore, Peter will get an injunction unless the hardships are balanced in Debbie's favor.

2. If the court does issue an injunction, and she does not comply, Peter should apply to the court for a contempt proceeding or finding. The court enforces its power to issue injunctions through its contempt power. If Debbie does not comply, she can be found in contempt of court and may be issued a fine or other penalty.

Peter should apply to the court to find Debbie in contempt, and he should be successful because she disobeyed a court order.

3. Collateral Bar Rule

The collateral bar rule prohibits the plaintiff from arguing at a contempt hearing that the injunction is invalid. Debbie took the correct route of appealing the injunction itself.

Usually, a person must comply with an injunction, and the fine will not be overturned because the act was court ordered. In this case, the appellate court ruled that the

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Remedies

injunction was invalid, but should not reverse the \$1,000 fine, because she did not comply with the original court order. If she did comply, she would have suffered harm, but it could be compensated through damages (paying to rebuild porch). If she did not agree with the order, she should have gone to court for a stay of the order and would not have been found in contempt.

4. If Peter waited a full year to bring suit, Debbie's motion to dismiss would depend on two factors - laches and the statute of limitations.

Laches

If the plaintiff knows of the encroachment or other wrongful act, but sits on his rights and does nothing, then he may not be able to bring a suit later because the doctrine of laches will apply. Here, Peter would have sat on his rights for a year. During that time Debbie believed that the porch was on her property. If Peter in any way acquiesced in this belief or prejudiced Debbie by the delay in bringing suit, then he will not succeed on the merits, and the case should be dismissed.

Statute of Limitations (SOL)

If there is a relevant statute limiting the period in which Peter could bring his claim, then his suit will be barred if not brought within that period. There are no facts to indicate what the SOL is, but for trespass it is likely longer than one year.