ARKANSAS BAR EXAMINATION
JULY, 1999

3 Pages
30 Minutes

CRIMINAL LAW AND PROCEDURE

Judge Bruce "Turn 'em Loose Bruce" Dobbs (a liberal Judge who got his nickname from the local police because of his rulings) has been a lawyer for 24 years and a judge for 12.

On June 1, an attractive woman stopped by the Judge's office to visit with his administrative assistant, Jolene Secretary. "Who was that?" the Judge asked admiringly after the visitor left. "Oh, that's Wanda. I know her from school," she replied.

On June 5, Secretary and Wanda had lunch. Secretary asked Wanda: "Would you be interested in going out with my boss? He's single, and expressed an interest in you!"

"Sure," said Wanda, "but it will cost him $150. See, I work for an escort service. I'm a prostitute and have been for three years. Here's my card."

Secretary went back to the office and told Judge Dobbs the news. "My goodness," he said, looking at the card, "I've never heard the like." He laughed nervously and threw the card onto some papers on his desk.

On June 10, Wanda was arrested for drugs. "Give us names of your customers," the police demanded, "or you'll go to prison for life."

"Well there's Terry and Paul and Jolene Secretary -- she works for Judge Dobbs."

"Oh boy," said the police. "See if you can sell her some. We'll drive you over there."

Wanda enters the Judge's office, but Secretary doesn't want any drugs. The Judge is leaving for lunch and sees Wanda. They chat warmly. When Wanda gets back to the detective, she says "No luck selling to Jolene Secretary. But the Judge's secretary knows I'm a hooker -- I even gave her my business card - and he seemed interested in me. Maybe, I can make a date with him."

"Oh boy, oh boy" the detectives say.

Wanda then places a call to the Judge's office. It is tape-recorded. The conversation proceeds:

"Hi Judge. This is Wanda. Remember me?"

"Oh, yeah"

"You know what I am, and we could really have a good time together."

"Oh, wow," the Judge said. "Do you think we could get together this afternoon at the NoTell Motel? I have $150 that's burning a hole in my pocket even as we speak."

Wanda and the Judge make a date to meet at the NoTell Motel at 4:00 p.m.

The Judge shows up and is video-taped giving the prostitute $150 for her agreement to have sexual activity with him. The police enter the motel room when Wanda gives a pre-arranged signal. They arrest the Judge for patronizing a prostitute. That statute reads:

"(a) A person commits the offense of patronizing a prostitute if he:

(1) Pays or agrees to pay a fee to another person on an understanding that in return that person or a third person will engage in sexual activity with him; or

(2) Solicits or requests another person to engage in sexual activity with him in return for a fee.

(b) Patronizing a prostitute is a Class C misdemeanor.

(c) A Class C misdemeanor is punishable by a term in the county jail not exceeding thirty (30) days, and a fine not exceeding $250."

As the police enter the room, they say: "You're under arrest for patronizing a prostitute, Judge Dobbs. Where's the business card, the one your little friend here gave Jolene?" The Judge says "I don't know, on my desk I guess." The police go to his office and tell Jolene Secretary that they've just arrested the Judge and need to pick up the business card for evidence. She shows them his desk and they find the card. "We're gonna take this for evidence, is that OK?" Jolene Secretary says: "As far as I'm concerned." The police take it to the evidence room. The prosecutor announces to defendant's lawyers that he will introduce the card and the Judge's statement, after his arrest, at trial.

Questions:

- Does Judge Dobbs have any defense(s) to the charge of patronizing a prostitute? If so, briefly discuss the defense(s), and what the judge would need to produce or prove to establish the defense(s).
- Can the judge's lawyers get any of the evidence suppressed?

ARKANSAS ESSAY
ANSWER

CRIMINAL LAW AND PROCEDURE

July, 1999

#1 Does the judge have any defenses?

The question does not specify the subsection of the statute the judge is charged with. I will deal with both.

Sub-section one requires that the defendant "agree to pay" or "pays" another on an understanding that person or someone else "will engage in sexual activity" with the defendant. The statute does not state whether the other person must actually intend to provide sexual services. Criminal statutes are subject to strict construction to narrowly restrict their application to the precise terms of the statute. If the statute were construed to require actual agreement, analogous to the common law rule requiring bilateral agreement in a conspiracy, the judge would have a defense, because Wanda did not intend to provide the services. The statute is unlikely to be so interpreted.

There are several reasons for this conclusion. First the language would have to be broadly construed (ie go beyond its express terms) to imply this requirement. Second, Arkansas like most states has rejected the "bi-lateral" requirement as applied to conspiracy so the analogy cuts against the judge's position. Third, it is unlikely the legislature intended to add such a requirement, as anti-prostitution crimes are generally enforced through use of undercover police officers and such methods are necessary due to the private and consensual nature of the prohibited behavior.

The second sub-section prohibits "solicit(ing) or request(ing)" another to engage in sexual activity for a fee. On the facts, the judge never "request(ed)" or solicit(ed)" Wanda. She solicited him and he agreed. This should provide a viable factual defense to a subsection two prosecution.

The judge may also assert an entrapment defense to prosecution under either subsection. To do so, the judge must present sufficient evidence to raise the defense, then the state must prove either that the impetus or idea for the crime did not originate with the state (law enforcement) or that the defendant was pre-disposed to commit the crime.

Here Wanda was not a member of law enforcement. Nor was she acting at the request or direction of the police when she first offered sex in her conversation with Secretary on June 5. On the other hand the Judge did not accept this offer or give any indication he intended to accept.

When Wanda returned after her arrest she was acting for the police. She did re-initiate the suggestion of sex for pay. There is no evidence of facts in the question that suggests the judge was pre-disposed.

a) The card.

The judge may move to suppress the card. It was obtained on a warrantless search and seizure of the judge's office. Although a public office, the search was not incident to an employment related crime. The judge can argue he had a reasonable expectation of privacy. There were no exigent circumstances justifying the search, nor was it a search incident to the judge's arrest. The state may argue that Secretary gave permission. The judge's counter is that she had no actual or apparent authority to let others search his desk. The state will also argue that they

would inevitably have discovered and obtained the card.

The success of this argument depends in part upon the suppression of the judge's statements.

b) The Statement.

The judge's statement was made after arrest and pre-Miranda. It was made in response to a direct question. Therefore it was made in response to a direct question. Therefore it was a post custodial interrogation and should be suppressed. Without the statement the judge can argue that the state would not have known where to look for the card. In fact, however, Wanda had told the police she gave the card to Secretary. Secretary said the judge put it on his desk, and presumably would tell the police this when asked. Therefore, the state can argue they would inevitably have discovered the card.

The statement should be suppressed. So should the warrantless seizure of the card, unless the court holds there is no expectation of privacy as to the contents of a judge's desk in the judge's chambers.

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TORTS

Bob, his wife Sue, and their minor son Little Joe, were having breakfast in their apartment where they had lived for two years. Little Joe had consumed about half of his "Wake Up" juice bottled by "Rise and Shine" Company, when he noticed some slimy foreign object on top. Sue investigated and determined there was part of a "slug" still in the bottle. Little Joe became nauseated and extremely ill and they decided to take him to the emergency room of the local hospital.

Bob, Sue and Little Joe were hurriedly crossing a short wooden bridge on the apartment complex premises going to the parking lot when an obviously rotten board gave way and Sue fell and injured her back. Sue had told the landlord twice in the last six months about rotten boards on this same foot bridge.

Bob got Sue and Little Joe in his vehicle and left for the hospital. As Bob was dashing down the highway, he was also trying to tend to Sue and Little Joe. Tom, while checking his road map, pulled out of a side road onto the highway and hit Bob on the driver's side. Bob suffered a broken leg and a broken arm. Bob was hospitalized for one week and was not able to return to work for one month. Sue and Little Joe were not injured in the automobile accident but Bob's vehicle was damaged a great deal.

Bob, Sue and Little Joe have contacted you for advice concerning their legal rights and possible remedies against "Rise and Shine" Company, their landlord and Tom. Please discuss the issues and how you would advise them.

ARKANSAS ESSAY
ANSWER

TORTS

July, 1999

Little Joe & "Rise & Shine"

Strict Liability

Little Joe may prevail against "Rise & Shine" (R & S) under a strict liability theory. In order to be successful, he must show that the juice was defective at the time it left R & S and that the defect caused (actually & proximately) Little Joe to become ill.

Clearly, a slug in the juice would be a defect. Although it is not clear that the slug was in the juice at the time it left R & S, there doesn't appear to be any reasonable explanation how or when it got in the juice. As R & S would be strictly liable, it cannot assert any defense that it used reasonable care in producing the juice. Furthermore, it is clear that R & S actually & Proximately caused Little Joe's injuries. It is foreseeable that a slug in a bottle of juice would make anyone sick, especially if the slug had toxins. Therefore Little Joe should be able to prevail under a strict liability theory if he can prove actual damages.

Negligence

Liability under a negligence theory requires a duty, a breach of duty, causation, and damages.

Duty - Under these circumstances, a bottler of juice has a duty of reasonable care to manufacture its products in such a way to produce a safe product for consumers.

Breach of Duty - R & S breached its duty of reasonable care if it failed to inspect for, or warn of, slugs if a reasonable manufacturer would have done so. It is clear that a reasonable manufacturer should have made such an inspection, if it would have revealed the presence of foreign objects. As R & S should have been able to detect a slug, it breached its duty of care. Little Joe may also argue res ipsa loquitor in that slugs aren't ordinarily in juice, the juice was in the control of the manufacturer, and therefore R & S must have breached its duty of care.

Causation - Little Joe must show that the slug actually and proximately caused his injuries. The presence of the slug actually caused his injuries because he would not have become ill but for the slug. The slug also proximately caused his injuries as it is reasonably foreseeable that a person would become ill from a slug in his juice.

Injuries - Little Joe must be able to document his injuries. Based upon this analysis, Little Joe should be able to prevail under a negligence theory.

Sue & The Landlord

Arkansas is very generous to landlords in that it still follows common law regarding landlord/tenant law which favors landlords. However, regarding negligence and landlords, the following exception existed. At common law, landlords had a duty to repair common areas if the landlord was made aware of the defect or problem. As such, a duty would be imposed on the landlord.

Breach of Duty - Landlord breached his duty to make repairs to the bridge. The bridge was both in a common area and he/she had notice of the bridge. Therefore, Landlord breached his duty.

Causation - Following the rules given regarding Little Joe and causation, it is clear that Landlord's breach actually and proximately caused Sue's injuries. Sue would not have fallen but for the breach by the landlord - actual cause. Further, the landlord's breach proximately caused her injuries as it is reasonably foreseeable that a tenant would fall on the bridge.

Injuries - Sue may prevail if she can prove injuries.

Possible Defense - If Sue was aware of the defective bridge, but used it anyway, Landlord may argue contributory negligence which may diminish Sue's recovery under Arkansas' comparative fault statute.

Bob & Tom

Bob may be able to recover from Tom under a negligence theory. Focusing on the elements of negligence outlined above, Tom clearly had a duty of care to operate his vehicle in the manner of a reasonable person. Further, Tom breached this duty by pulling out into traffic without looking. This is negligence per se in that it would violate our (Arkansas') law which requires drivers to keep a proper lookout and to yield when entering a highway on a side road (where presumably there was a stop sign). In addition, Tom's actions were the actual and proximate cause of the accident and Bob's injuries. Therefore, Bob may be able to prevail on a negligence theory if he can prove his damages.

- Comparative Fault - Bob may have been contributorily negligent by speeding down the road. This may diminish his recovery, or eliminate it altogether if he was at fault, 50% or greater under Arkansas' comparative fault statute.

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EVIDENCE

Carol Customer has sued the Antique Store, Inc. ("ASI"), for personal injuries which Ms. Customer sustained while she was on the property of defendant ASI. More specifically, on March 1, 1999, Ms. Customer had gone to ASI to purchase an antique lamp. After making her purchase, and while she was in the process of exiting the ASI store, she fell down a flight of stairs which caused her to break or fracture her right ankle. Ms. Customer contends that the wooden flight of stairs and hand rail were negligently designed and constructed, and that said design and construction defects were the proximate cause of her fall and resulting injuries. ASI denies that its stairs and hand rail were negligently designed or constructed and that any injuries sustained by Ms. Customer were the result of her own negligence or clumsiness.

Assume that all events, including the filing of a law suit, are alleged to have occurred in the State of Arkansas. The case is now at trial and the following evidentiary issues will arise:

(1) In order to prove that the subject flight of stairs and hand rail were negligently designed and constructed, Ms. Customer's attorney intends to elicit testimony from Ms. Customer and others that two weeks after her fall, defendant ASI had the subject flight of stairs and hand rail torn down and rebuilt. The plaintiff hopes that this act by defendant ASI will give rise to an inference that the flight of stairs and hand rail must have been defective, or why else would ASI have had them rebuilt.

(2) In order to prove that defendant ASI has in essence admitted its negligence, Ms. Customer's attorney intends to introduce evidence that a month before the trial, defendant ASI offered Ms. Customer the sum of $25,000.00 to settle the case, which sum was rejected by Ms. Customer as being inadequate. The plaintiff hopes to argue that defendant ASI would not have offered such a large sum if it were not at fault.

(3) In order to prove the nature and extent of Ms. Customer's injury, Ms. Customer's attorney intends to introduce a sworn (notarized) report from Dr. Bones, Ms. Customer's treating orthopedic surgeon. Dr. Bones' report contains a diagnosis of Ms. Customer's injuries received in the subject fall, it describes her course of treatment by Dr. Bones, and it states his expert opinion that Ms. Customer will have intermittent pain in her right ankle at the fracture site for the rest of her life. Ms. Customer's attorney will attempt to introduce this sworn report through the testimony of Ms. Customer, who will state that the report was prepared in her presence the day before trial, in Dr. Bones' office, and that she personally witnessed Dr. Bones swear to the accuracy and truthfulness of his report. No representative of the defendant was present at the time Dr. Bones' report was prepared and executed. Ms. Customer's attorney does not intend to call Dr. Bones as a witness because his expert witness fee for testifying is too high.

In each instance described in parts (1), (2), and (3) above, assume that the plaintiff is eliciting correct and truthful testimony. Assume further that you are defense counsel for ASI. What evidentiary objections, if any, would you make to the plaintiff's effort to offer the evidence as described in (1), (2), and (3) above? State the legal and factual basis for your objection.

ARKANSAS ESSAY
ANSWER

EVIDENCE

July, 1999

1. Ms. Customer's potential testimony is objectionable on the grounds that it is evidence of subsequent remedial measures. The Arkansas Rules of Evidence state clearly that testimony portending to show that w/respect to the object at issue subsequent remedial measures were taken to repair said object will not be allowed. This is based on a public policy rationale; if this type of evidence were allowed, it might encourage public property owners to neglect to fix unsafe or potentially unsafe areas, for fear that they might be more reachable in negligence at trial. Thus, Ms. Customer's testimony here should not be allowed.

2. Ms. Customer's testimony is objectionable on the grounds that it is evidence of prior settlement negotiations. The Arkansas Rules of Evidence state clearly that testimony portending to show the existence of prior settlement negotiations will not be allowed. This is based on a public policy rationale; it is the province of the Courts and the law to encourage settlement of claims before litigation. If this type of evidence were allowed to show that a charged party would not have offered a particular sum were it not at fault, settlement of claims would be discouraged.

3. I would argue that this testimony is inadmissible hearsay not covered by any exception. Ms. Customer purports to offer a statement not made by her to assert the proof of the matter at issue (her injury). She cannot do so here, because ASI would not have an ample opportunity to cross-examine. The purported subject matter can only properly be brought out by Dr. Bones himself, as expert testimony after a proper foundation has been laid. Furthermore, the fact that Dr. Bones is merely expensive does not mean that he is unavailable as a witness. Additionally, this type of report cannot come in under any type of work product exception. Even if the proffered report could somehow be considered an exception to hearsay, it is still probably inadmissible inasmuch as its prejudicial effect outweighs its probative value (as evidenced by the fact that no representative of defendant was present at the time of preparation or execution).

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CONTRACTS

Jack was having lunch with Fred and Jim. Jack said "My wife and I are going to have our farm

appraised and then sell it." Fred said: "I will give you $100,000 as long as the appraisal is at least $100,000." Jack said that he would call him when the appraisal was received. Jim, Jack's attorney, wrote out on a napkin: "Fred agrees to pay Jack and his wife the sum of $100,000 for their farm as long as it appraises for at least $100,000." After discussing the fact that Fred would probably need to get financing, both Jack and Fred signed on the napkin. Unknown to Jack, Andrew had asked Fred to buy the property for him since Jack would not sell the property to Andrew at any price.

The appraisal came in at $125,000. Jack called and told Fred about the appraisal and said that he and his wife would take $125,000 for the farm. Fred then sent a written offer and acceptance to Jack wherein Fred offered to pay the sum of $110,000 conditioned upon him being able to obtain an acceptable loan of at least $75,000. Jack and his wife refused to sign the offer and acceptance. Fred filed suit for specific performance of the agreement written on the napkin. Discuss the issues that are present.

ARKANSAS ESSAY
ANSWER

CONTRACTS

July, 1999

Regarding the napkin contract (K).

For a K to be proper certain requirements must be met.

Generally, the subject of the K must be legal. It appears that it is.

Secondly, there must be assent by both parties. There must be an offer and an acceptance. In this case there appears to be an offer by Fred, after an initial solicitation or conversation by Jack. Jack's comments would probably be too vague to constitute an offer.

Fred offers $100,000 on the condition precedent that an appraisal showed it to be worth at least that much. This condition is later met, the property is valued @ $125,000.

Because this is a contract for land, the Statute of Frauds applies. The Statute of Frauds make oral contracts unenforceable when the subject matter of the contract is land, goods over $500 made in contemplation of marriage, to act as surety for someone, for a executor to personally paid funds on estates behalf, contracts which cannot be performed in 1 year.

The Statute of Frauds also requires that for K's involving land the property must be described, a proper legal description is not necessary. This could be problematic if Jack & his wife own more than 1 farm.

Next, there must be capacity to enter the contract, from the facts presented it does not appear that Jack or Fred is under any impairment, drunkenness or mental defect. Although another problem is that jack's wife did not sign the K. Ark. assumes a tenancy in the entirety which

requires both parties to be charged sign off on land K's and deeds.

Consideration is also required if this is a bilateral K, or a promise for a promise and it would appear that the reason for entering the K is for what both parties are offering here.

Regarding Fred & Andrew. Fred is a undisclosed agent for Andrew. Generally, an undisclosed agent may enter K's on the principals behalf , however the agent remains liable. There is an exception where the principal knows the party dealing with the agent would not deal with the principal. The contract could be avoided on grounds of fraudulent misrep between Fred & Jack.

Specific performance is an equity or chancery cause of action and should be used when the normal legal or money actions would not make the parties whole and that specific performance is practiced, i.e., all parties or the property in question is before the court.

Typically, money damages or the legal remedy will not make the claiming party whole when there are unique. Land is almost also considered to be unique.

For the court to enforce a K by specific performance there must be a valid contract, both parties capable of completing the contract and that no defenses are available.

In this case regarding the original K it could be argued that it is unenforceable because of the Statute of Frauds too vague (if Jack's wife owns other farm) that it did not comply because both parties to be charged did not sign.

Possibly the last defense would be the equitable defense of unclean hands because Fred was a party to fraud in inducing Jack to "enter" the K because of the undisclosed status of Andrew, who it was known by Fred & Andrew that Jack would not deal w/Andrew.

There could not be specific performance for the latter "K" because it did not meet the formal requirements and therefore there was not a valid K and the court should not rule on the case.

These were simply offers which were not accepted.

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CONSTITUTIONAL LAW

After passing the bar, you find a job in the office of an Arkansas Senator. The Senator, who serves on the Children and Youth Committee, is drafting a statute to codify the factors a court should consider in a custody proceeding to determine which parent serves the best interests of the child. The Senator is meeting with the Committee in half an hour and wants to be ready to address any constitutional issues raised by the Committee. The Senator has already determined that the law is <u>not</u> <u>vague</u> as drafted but has asked you to review the following draft and to write

a brief memo discussing any other constitutional problems you see. The Senator needs a focused memo that is easy to understand so that she may respond to the Committee's questions.

Proposed Statute

"The Court shall determine custody in accordance with the best interests of the child. Neither parent is entitled to preference as a matter of right in awarding custody of the child. In determining the best interests of the child the court shall consider all relevant factors including:

- the physical, emotional, mental and social needs of the child;
- the capability and desire of each parent to meet these needs;
- the assurance of religious instruction in the home;
- the child's preference;
- the love and affection existing between the child and each parent;
- the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- the desire and ability of each parent to allow an open and loving frequent relationship between the child and his other parent."

ARKANSAS ESSAY
ANSWER

CONSTITUTIONAL LAW

July, 1999

The statute involves a matter that is within the state's power to regulate, family law. It must be determined whether law infringes on any fundamental rights of either the parents or the children in a way that is considered unconstitutional.

Parents have a fundamental right to bear children and to maintain a relationship with their children, and case law has historically afforded this right great protection. Of course in divorce, custody must naturally go to one parent or the other, and this in no way violates a parent's rights. The "best interest of the child" standard has long been recognized as appropriate in determining custody. The factors proposed by this statute are fairly typical. However, there may be a constitutional problem with factor #3: "assurance of religious instruction in the home."

Weighing religious instruction as a consideration may violate either or both parent's freedom of religion as guaranteed by the First Amendment. Individuals are guaranteed both (1)freedom of religious expression and (2)freedom from establishment of religion by the state. Using the "religious instruction" factor in determining custody is potentially unconstitutional because parents have a very great interest in custody of their children and this statute allows the state to judge the adequacy of the parent's instruction and possibly beliefs.

If one parent practices a religion that the state views as "alternative" or practices no religion at all, it may adversely impact the custody decision for that parent. Under the First Amendment, this should not be allowed because it may stifle free expression of belief or non-belief. Further,

it violates the establishment clause of the First Amendment because the statute tends to prefer religion over no religion.

The test used for the establishment clause is the Lemon test. It states that a law affecting or addressing religion should (1)serve a secular purpose, (2)neither advance nor hinder religion, and (3)not promote excessive entanglement between state and religion. While this law as a whole is secular, this 3rd factor addressing religious instruction tends to advance religion over nonreligion. Also it might create excessive entanglement as a judge tries to determine which parent would assure instruction, although the very nature of custodial determination is already pretty "entangling between state and individual.

Absent a compelling need shown by the state to advance an important government interest, any law infringing on a fundamental right is unconstitutional. Freedom of religion is a fundamental right given by the First Amendment. While the state may desire to see religious instruction used as one of many factors to determine custody, this part of the law could probably not withstand a constitutional challenge.

The other 6 factors addressed in the proposed statute seem appropriate in light of the state's goals and will probably not create any constitutional problems.

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PROPERTY

On May 1, 1998, Billy Yank sold Ima Poacher eighty acres of land (Black Acre) in a remote area of Deerfield County, Arkansas. Although Billy had inherited the land from his grandfather some thirty years ago he had never visited the property.

Two weeks later Terra Firma sold Ima Poacher eighty acres (White Acre) immediately East and contiguous to Black Acre. While Poacher walked over much of the property prior to its purchase, dense undergrowth on the northern portion of Black Acre kept her from going all the way to the North line of Black Acre.

Unbeknownst to either Billy or Poacher, Squatter owned Red Acre which was located just North of and contiguous to Black Acre, having purchased this land in 1994 from Rock Claude. Rock had purchased the land in 1966 from Joe Generous. At the time of this sale, Generous told Rock Claude to take "a little extra." With that, Generous cleared a line east to west through the North ten acres of Black Acre. Rock Claude put up a fence and ran cattle on all of the property for the entire time he owned it. After Squatter purchased the property he hunted on the property and used it occasionally as a weekend retreat. The fence fell into disrepair and, although still visible, was on the ground in some places by the time Poacher purchased Black Acre.

Rock Claude and Squatter have paid all the taxes when due on Red Acre as have Billy Yank

and Ima Poacher on Black Acre.

Ben E. Factor, a resident of Deerfield County, Arkansas, owned White Acre until he died intestate suddenly on December 2, 1997. For some years prior to his death he enjoyed a close relationship with Terra Firma, having taken most of his meals at her home and kept some of his important papers there as well.

On September 1, 1996, Ben borrowed $4,500.00 from Terra Firma and on the same day executed a Warranty Deed to White Acre, the Deed purporting to convey title to Terra Firma. Ben paid off this note the day before his death. Within days after Ben's death Terra Firma filed in the office of the recorder of Deerfield County the Deed which conveyed White Acre to her.

During the Spring of 1999 Squatter realized that Ima Poacher was hunting on what Squatter believed to be the Southern ten acres of Red Acre and what Ima Poacher believed to be the Northern ten acres of Black Acre. On July 19, 1999, Squatter filed an action in Deerfield County Chancery Court naming Ima Poacher as defendant and seeking quiet title in Squatter in the Northern ten acres of Black Acre.

In July, Max Factor, as administrator of the Estate of Ben E. Factor, brought suit on behalf of Ben's Estate to recover White Acre naming both Ima Poacher and Terra Firma as defendants.

On July 27, 1999, Ima Poacher appears in your office with both lawsuits and, after paying you a hefty fee, pleads with you to "save my huntin' ground."

Assume that all the facts set out above can be proved by competent admissible evidence at trials of these matters.

Can you save Ima Poacher's huntin' ground? Discuss the issues.

ARKANSAS ESSAY

ANSWER

PROPERTY

July, 1999

Quiet Title Suit for Blackacre:

It is not possible to save Ms. Poacher's interest in the north ten acres of Blackacre. The main issue that will decide this case is whether the actions of Squatter in placing the fence over the north ten acres of Blackacre and claiming the property as his own for 30 years will amount to adverse possession. In Arkansas the requirements for adverse possession require hostile, exclusive, uninterrupted possession of the property adverse to the rightful owner for a period of seven years. In addition the possessor must now have color of title and pay taxes on the land or land adjacent to the property in question.

The actions of Rock Claude & Squatter in putting up a fence and running cattle over the land for the entire 30 years clearly amount to a notorious, continuous hostile use of the property.

Billy Yank as the then owner of BA is charged with notice to exam his property and discover this adverse use especially since a fence was placed up and cattle were grazed on the property.

Assuming the requirements of adverse possession are met, Ms. Poacher will not be able to use the recording acts to save her because this statute will not act to defeat the prior claims of those who don't acquire the property by "conveyance." This would be the case even if Mrs. Poacher were to record the instrument and take without notice.

Rights as to Whiteacre:

Ms. Poacher is unlikely to have any interest whatsoever in Whiteacre as a result of the action to quiet title:

The problem that has arisen in the chain of title of Whiteacre centers around the delivery of the deed to Terra Firma by Ben. While there was an actual delivery of the deed to Terra Firma it seems clear that the intent of the parties was for this transfer of the deed to be only a mortgage transfer and not an actual transfer of the property. A court examining the transfer of the deed at the time of the loan and the subsequent payment of the debt is going to view this as a mortgage.

As a result Terra Firma had no title in Whiteacre in which to convey to Mrs. Poacher because such a transfer of title without the grantor's intent to convey is never effective to transfer title. Because Ben paid the debt prior to his death it will deemed that this property and deed should have been redelivered to him and the property will pass as part of his estate. Mrs. Poacher's only remedy will be in a suit against Terra Firma under the breach of the covenant of seizin assuming a warranty deed was used to transfer the property.