

PROPERTY I MINI-HYPOTHETICAL QUESTION AND ANSWER, FINAL

Prof. Bell

Here please find a simple essay question and, starting the next page, a sample answer. To best practice for the exam, try writing your answer first, before looking at the model.

Mini-Hypothetical Essay Question

Mr. and Ms. Query owned Blackacre as joint tenants in fee simple absolute. Ms. Query secretly conveyed her interest to herself in an instrument that added, "I hereby terminate the joint tenancy in Blackacre with Mr. Query." Ms. Query thereafter leased a portion of the property to Mr. Mighty, over the objections of Mr. Query, for Mr. Mighty to use for holding boxing matches. Their lease provided that Mr. Mighty would pay \$1000 on the first day of each month during which he was permitted to use the property. Mr. Query demanded from Ms. Query one-half of the rents received from Mr. Mighty. Describe the property relations between the parties and Mr. Query's rights and remedies.

Sample Essay Answer

Did Ms. Query sever the joint tenancy? In *Riddle v. Harmon*, the California Supreme court allowed one joint tenant to sever the tenancy unilaterally and, indeed, secretly, eschewing the common law requirement of a straw and other "elaborate legal fictions." P. 328. Here, that same rule would render Ms. Query's instrument effective to sever the joint tenancy, making it (unbeknowst to Mr. Query) a tenancy in common.

Riddle is not evidently the majority rule, however; see n. 1 p. 329. In truth, our text never reveals the majority rule (though it surely says something that, as *Riddle* reveals, even to allow the *creation* of a joint tenancy without a straw was bucking the common law presumption). We should thus also analyze this problem under the alternative rule: A joint tenancy cannot be unilaterally and secretly severed. In such a jurisdiction, Mr. and Mrs. Query would remain joint tenants in fee simple absolute because Ms. Query failed to use a straw and/or record the transaction.

What is the status of the lease if the Querys had a joint tenancy? The Court in *Swartzbaugh v. Sampson* held that a joint tenant can covey by lease to a third party all the rights that that tenant has in the subject property. A joint tenant has the right to (nonexclusively) use any jointly owned property. Under that rule, if Mr. Mighty is a joint tenant, he is powerless to stop the boxing exhibition. Ms. Query could via lease give Mr. Mighty all the (nonexclusive) use rights that she herself enjoys in the joint tenancy.

What if Mr. Query is not a joint tenant but instead, and unwittingly, a tenant in common with Mr. Query, on grounds that she successfully severed the property? Evidently, the same rule as in *Swartzbaugh* applies. The *Swartzbaugh* court used a long quote from a case pertaining to the rights of tenants in common, *Lee Chuck v. Quan Wo Chong & Co.*, as justification for its holding. Ms. Query would thereby still have the same right to convey via lease to Mr. Mighty all of her rights to the property—which rights include the right to (non-exclusively) use the property for boxing exhibitions. (What marks joint tenancies as different from tenancies in common is not the right to enter into leases with third parties, but rather the right of survivorship and the four unities. See p. 320.)

It thus seems likely that Mighty has an enforceable leasehold agreement, albeit one that does not afford exclusive possession. What sort of leasehold agreement? The agreement allows Mr. Mighty to use the property for one month at a time upon payment of \$1000, "first day of each month during which

he was permitted to use the property." That makes it sound like a periodic lease, which lasts for a fixed duration (here, one month) in succeeding periods until either party gives notice of termination, given that the boxing lease is premised on a month-to-month term renewable at the option of either party. See pp. 421-22. On that reading, the reference to "he was permitted" means simply he has not materially breached the lease agreement nor has a notice of termination taken effect.

Alternatively, you might read that same language to create a tenancy at will. Granted, the argument faces this hurdle: A tenancy at will is "is a tenancy of no fixed duration," whereas Mr. Mighty's tenancy lasts for a month at a time. P. 422. Perhaps you could counter that modern statutes typically require a time equivalent to the interval between rent payments for termination of a tenancy at will, p. 423, rendering this tenancy at will the functional equivalent of a monthly periodic tenancy. It's a stretch, but courts are a bit more relaxed about characterizing leases than they are about characterizing estates in real property.

What can Mr. Query do to terminate the lease? If it is a periodic tenancy, according to the usual rule, the lease can be terminated with as little as one month's notice (since that is the period of the term), though at all events the lease must run through the end of the last month. See p. 422. Mr. Query—or, at least, Ms. Query acting under compulsion of a court order won by Mr. Query—can terminate Mr. Mighty's lease effective at the end of the month after the month in which notice is given.

What if the lease is tenancy at will? As noted above, modern statutes typically provide for a minimum notice of termination in such cases of a time equal to the interval between rent payments—here, a month (or 30 days—which here amounts to much the same thing). So, again, Mr. or Ms. Query would have to give Mr. Mighty a month's warning before terminating the lease.

(Why do we care about the form of lease and notice? Because it could have some bearing on the remedies afforded to Mr. Query—or, more exactly, the damages Ms. Query might owe Mr. Mighty if, due to Mr. Query's pursuit of his remedies, she has to cancel the lease prematurely.)

What are Mr. Query's rights and remedies? As outlined on p. 356, he has three basic options: Partition, an accounting, or ouster.

First, Mr. Query could seek partition. This might be partition by sale or in kind. Modern courts generally favor

the former (see p. 343), though they may afford some weight to sentimental attachments to the land and in all cases aim to best serve all the tenants interests. See, e.g., *Delfino v. Vealencis*. That approach here suggests that a court would, if Mr. Query sought partition, probably favor partition by sale of either the entire property or just the portion subject to the lease. In either case, Mr. Query would presumably get one-half the proceeds. If instead the court awarded partition in kind, Mr. Query would presumably get 1/2 the property but not the portion subject to the lease, which would probably go to Ms. Query. In the case of either partition in kind or by sale, supposing that Ms. Query ended up with a disproportionate share of the estate, Mr. Query might have the right to owelty payments by Ms. Query to balance their interests. See p. 346.

Second, Mr. Query could bring an accounting to win the right to 1/2 of the rents received by Ms. Query from Mr. Mighty, minus expenses. *Riddle* discusses this rule at the bottom of p. 352; see also p. 357. Note that, in contrast to the remedy afforded for ouster, this award would look not to the market value of the lease, but rather the payments owed under the lease. Mr. Query would thus get \$500/month minus the 1/2 of the expenses of leasing the property.

Third, Mr. Query could win the remedies of an ousted cotenant. To do so, Mr. Query would have to try to enter into possession with Mr. Mighty and find himself barred from doing so. See *Spiller v. Mackereth*, which lays out the rule that ouster obtains only if a co-tenant is denied the right to enter the property by the other co-tenant(s). If thus ousted, Mr. Query could get 1/2 of the *reasonable rental value* of the lease (versus the remedy afforded by an accounting: one-half of the lease rate minus expenses). See p. 357 for the rule. If Ms. Query rented the property below market rates, the ouster remedy might afford Mr. Query a greater remedy than an accounting would.