

PROPERTY PRACTICE QUESTIONS

ANSWER 18

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Caveat: The outline of the answer below provides guidance regarding the main issues which you should address in your answer. The answer is *not* designed to be a model answer.

Brian v. Richard (Covenant issues)

Validity of the covenant

- Because Brian and Richard's land is in Texas, Texas elements for a valid covenant must be satisfied
 - *Enforceable promise*
 - Brian and Richard bought their houses from a developer for \$250,000 each. It looks like they paid adequate consideration and it is likely that the rest of the elements for an enforceable promise were satisfied.
 - *Intent to run with the land*
 - It is likely that Brian and Richard intended for their promises to run with the land.
 - *Evidence of intent*
 - *In Esse (in existence) requirement*
 - The requirement does not really "fit" these type of facts (not like a covenant to keep an existing fence in repair) but you could say that the lack of outdoor animals already existed.

- *Words that show that the original parties intended for the covenant to run with the land*
 - Words “their heirs and assigns” is evidence that the parties intended to bind their successors.
 - ***Promise must touch and concern the land***
 - *Benefit and burden must touch and concern the land*
 - Each land owner’s covenant not to keep outdoor animals (except for cats and dogs) on their land increased the property value in the neighborhood. It also burdened each owner’s land as they could not do with it as they pleased.
 - ***Privity***
 - Texas requires *mutual* or *horizontal* privity
 - In this case, we have horizontal privity because the original parties to the covenant were the buyer and the seller.
- It appears that all the elements of a real covenant are satisfied and the only way Richard can win on the covenant issue is if he shows that the covenant has terminated.

Termination of the covenant

- ***Unclean hands***
- Richard can assert in his defense that Brian cannot bring a suit against him because he has breached the covenant himself by keeping a peacock in his front yard.
 - The jury could find for Richard on this issue. But even if they found that Brian could not bring a suit against Richard, someone else who did not own an outdoor peacock could.
- ***Acquiescence***
- To defend himself from Brian and from the other neighbors who could possibly bring a suit against him (any of the covenantees can bring a suit against their breaching neighbor), Richard can assert acquiescence.

- Neighbors saw that many people in the neighborhood owned peacocks and they should have immediately brought suit. Richard will claim that because of the neighbors' non-action the covenant has terminated.
 - Brian and the other neighbors (if they were to bring a suit) can counterclaim by stating that Texas recognizes broad construction of the covenants.
 - Parties intent plays a big role
 - Here the covenanting parties' intent was to keep up the property value
 - Peacocks do not really lower the property value because they are beautiful decorative birds and are not a nuisance like pigs
- The jury could decide either way on this issue

Brian v. Richard (Nuisance)

- Classification
- If the jury finds that Richard's activity constitutes a nuisance, they will likely find that this is a *private nuisance* because it involves a small group of people at most.
- **Nuisance** is *use of property which unreasonably interferes with the use and enjoyment of another's property*
- Plaintiff must show that his property was *reduced in value*
 - Brian can show that his land value was reduced by the noise and the smell from the pigs next door
- Courts consider several relevant factors to determine if there is nuisance (judged from an ordinary reasonable person's, not an overly sensitive person's, perspective).
- *Suitability*

- Keeping three pigs in a front yard is probably not a suitable activity for a nice residential neighborhood in a city
- ***Compliance with zoning regulations***
 - Although from the facts it looks like no zoning regulations were broken, but the covenant was breached.
 - Breach of the covenant may be a relevant factor to show that the activity constituted a nuisance.
- ***Priority of offending activity***
 - The residential neighborhood was there first. Had it happened in a rural area, the situation would have been different. Texas right to farm laws would have come into play.
- ***Social utility of the activity***
 - Pigs are useful animals. However, from the facts it does not appear that Richard had any use from them except for enjoying them as pets.
 - Pigs are also more socially useful on the farm than they are in someone's front yard in a city.
- ***Cost of avoiding harm***
 - Cost of avoiding the harm would not be big at all; it would only require selling the pigs to a farmer.
- Considering the factors above the jury will likely find that Richard's pigs constituted a private nuisance to Brian and that an injunction should issue.