

A woman owned a lot, which was improved with a dwelling. Her neighbor owned an adjoining unimproved lot suitable for constructing a dwelling. The neighbor executed and delivered a deed granting to the woman an easement over the westerly 15 feet of her lot for convenient ingress and egress to a public street, since the woman's lot only abutted a dirt road. The woman did not then record the neighbor's deed. After the woman constructed and started using a driveway within the described 15-foot strip in a clearly visible manner, the neighbor borrowed \$100,000 cash from the bank and gave the bank a mortgage on her lot. The mortgage was promptly and properly recorded. The woman then recorded the neighbor's deed granting the easement. The neighbor subsequently defaulted on her loan payments to the bank.

The recording act of the jurisdiction provides: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to law."

In an appropriate foreclosure action as to the neighbor's lot, brought against the woman and the neighbor, the bank seeks, among other things, to have the woman's easement declared subordinate to the bank's mortgage, so that the easement will be terminated by completion of the foreclosure.

If the woman's easement is NOT terminated, what will be the reason?

- A. The easement provides access from the woman's lot to a public street.
- B. The recording of the deed granting the easement prior to the foreclosure action protects the woman's rights.
- C. The woman's easement is appurtenant to her lot and thus cannot be separated from her lot.
- D. Visible use of the easement by the woman put the bank on notice of the easement.

Explanation:

Recording acts are used to determine priority among competing property interests. In a **notice jurisdiction** (as seen here), a bona fide purchaser (BFP) has **priority** over an earlier property interest if the BFP took **without notice** of that interest. There are three types of notice:

Actual – a buyer has direct knowledge of a prior interest in land

Record – a document showing a prior interest is properly recorded in the land records and appears in the buyer's chain of title

Inquiry – a buyer knows, **or should know**, of circumstances that would prompt a reasonable person to investigate (eg, visible use of the property, reference to unrecorded transaction in recorded instrument)

Here, the foreclosure would only terminate the woman's prior easement over the neighbor's lot if the bank had no notice of the easement when it obtained a mortgage from the neighbor. The bank had no direct knowledge of the easement (no actual notice), and it was recorded *after* the mortgage was conveyed (no record notice). But if visible use of the easement put the bank on *inquiry* notice, the easement would not be terminated by the foreclosure.

(Choice A) An easement by necessity allows an owner of a landlocked parcel to cross another's land to access a public road and only terminates when the necessity ends. Although the woman's easement allowed her to access a public street, her lot was not landlocked since it abutted another street (no necessity).

(Choice B) Recording the deed granting the easement *prior* to the mortgage (not the foreclosure action) would have protected the woman's rights. But since she recorded the deed *after* the mortgage was conveyed, the recording did not protect her (ie, no record notice).

(Choice C) An easement appurtenant—an **easement** that benefits the easement holder's land by granting limited use or control of another's land—cannot be separated (ie, conveyed separately) from the easement holder's land. But it is only binding on subsequent purchasers (eg, the bank) who take with notice of the easement.

Educational objective:

In a notice jurisdiction, a bona fide purchaser who acquires a property interest without notice (actual, record, or inquiry) of an earlier property interest will prevail. A buyer has inquiry notice when he/she knows, or should know, of circumstances that would prompt a reasonable person to investigate (eg, visible use of the property).

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Actual notice



Record notice



Inquiry notice

