# PROPERTY 1108(D) MIDTERM EXAM ANSWERS

## PROFESSOR DE BEER

MONDAY, NOVEMBER 12, 2012, 16H10 – 17:40 (**90 MINUTES**)

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IN **PART I**, YOU MUST **ANSWER 1 OF 2 MULTIPLE CHOICE WITH BRIEF EXPLANATION QUESTIONS**. (15-20 MINUTES RECOMMENDED.)

THE ANSWER IN PART I IS **WORTH 20%** OF YOUR SCORE.

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IN **PART II** YOU MUST **ANSWER 2 OF 3 ANALYTICAL PROBLEMS OR ESSAY QUESTIONS**. (70-75 MINUTES RECOMMENDED.)

THE TWO ANSWERS IN PART II ARE **WORTH 70%** OF YOUR SCORE.

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OVERALL IMPRESSION OF BOTH PARTS IS **WORTH 10%** OF YOUR SCORE.

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YOU MUST WRITE **LEGIBLY** AND **DOUBLE-SPACE** ANSWERS IN **INK.**

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YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

(*E.G.* BOOKS OR NOTES, BUT NOT LAPTOPS, MOBILE PHONES OR SIMILAR DEVICES).

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THIS **EXAM IS SELF-EVALUATED**, AND WILL NOT COUNT DIRECTLY TOWARD YOUR FINAL GRADE IN THE COURSE.

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## STUDENT # _____

## SCORE ____ /100

(INSTRUCTOR USE ONLY)

| Letter Grade | Percentage | Point Value | Definition |
|---|---|---|---|
| A+ | 90-100 | 10 | Exceptional |
| A | 85-89 | 9 | Excellent |
| A- | 80-84 | 8 | Excellent |
| B+ | 75-79 | 7 | Very Good |
| B | 70-74 | 6 | Very Good |
| C+ | 65-69 | 5 | Good |
| C | 60-64 | 4 | Good |
| D+ | 55-59 | 3 | Passable |
| D | 50-54 | 2 | Passable |
| F | 0-49 | 0 | Failure |

## *Part I*

| **Option 1** | | | | |
|---|---|---|---|---|
| Correct choice of response | | | | |
| 0 | | 5 | | |
| Explanation (i.e. correct rationale for chosen answer, relative strengths to other possibilities) | | | | |
| 1 | 2 | 3 | 4 | 5 |
| **Option 2** | | | | |
| Correct choice of response | | | | |
| 0 | | 5 | | |
| Explanation (i.e. correct rationale for chosen answer, relative strengths to other possibilities) | | | | |
| 1 | 2 | 3 | 4 | 5 |
| **Option 3** | | | | |
| Correct choice of response | | | | |
| 0 | | 5 | | |
| Explanation (i.e. correct rationale for chosen answer, relative strengths to other possibilities) | | | | |
| 1 | 2 | 3 | 4 | 5 |
| **Total Score Part I** /30 | | | | |

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## *Part II*

| **Option 1** | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Clear & organized (i.e. logically well structured, articulate, persuasive arguments) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Overall impression (i.e. demonstrated understanding of subject, possible creativity) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| **Option 2** | | | | | | | | | | | | |
| Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Clear & organized (i.e. logically well structured, articulate, persuasive arguments) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Overall impression (i.e. demonstrated understanding of subject, possible creativity) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| **Option 3** | | | | | | | | | | | | |
| Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Clear & organized (i.e. logically well structured, articulate, persuasive arguments) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| Overall impression (i.e. demonstrated understanding of subject, possible creativity) | | | | | | | | | | | | |
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| **Total Score Part II (÷2)** **/60** | | | | | | | | | | | | |

| **Overall Exam Impression** | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 0 | 3 | 5 | 5.5 | 6 | 6.5 | 7 | 7.5 | 8 | 8.5 | 9 | 9.5 | 10 |
| **/10** | | | | | | | | | | | | |

## I. ANSWER ANY 1 OF 2 QUESTIONS IN THIS PART, WHICH IS WORTH 20% OF THIS EXAM. BRIEFLY EXPLAIN YOUR ANSWER.

***NOTE:*** **Both Questions 1 and 2 in this Part of the exam are based upon the same report in *The Martha's Vineyard Times* about a "billionaire beach fight" between wealthy landowners on the Massachusetts island. You do not need to read both questions in order to correctly answer either of them; focus on the question you choose to answer.**

1. **The first legal strategy of the plaintiffs in the case reported below was to argue that their rights to access the beach were preserved based on the property rules of shifting boundaries.**

The beach in question is between Oyster Pond (far left) and Job's Neck Cove (far right).

**Wealthy South Shore neighbors wage legal war over their beaches**

*October 24, 2012*

A court battle, begun in 2004, following the construction of a fence by one wealthy, South Shore neighbor to block beach access to another, also wealthy, who believed access was his by right and title, has spawned a furious, eight-year legal battle that is now before the state Supreme Judicial Court (SJC).

The fight, between successor owners to South Shore beach property that had been passed down through the White and Norton families, and to abutting waterfront land sold by members of the Flynn family, was argued on appeal before the SJC on October 4.

All the parties to the lawsuit trace their land titles to a "1712 deed from John Butler to Captain Samuel Smith."

The White-Norton forces … had enjoyed a neighborly accommodation for access from the Flynn owners, but the fence ended that.

The legal action, White v. Kohlberg, pits the Norton and White families and some landowners … including Richard L. Friedman … against a group of three trusts … and 40 property owners, including [the Kohlbergs and] Robert Levine, who bought land that had descended from the Flynn family.

Mr. Levine built the fence to stymie Mr. Friedman's access to the barrier beach separating Oyster Pond from the Atlantic. …

Do boundaries move with the sand?

In one sense, the heart of this legal battle has now become a boundary dispute. Over time barrier beaches — beach land that divides the Atlantic Ocean from the shores of Oyster Pond and Job's Neck Pond is at issue in this lawsuit — shift away from the ocean shore and toward the pond shore, in this case northerly. A combination of erosion on the ocean shore of the beach and accretion of sand – much of it blown over the dunes between ocean and pond – shifts the beach wholesale to the north.

What was the edge of the pond shore … centuries ago, is now north of where it was, and the surface area of the pond is reduced. …

The Land Court sided with Kohlberg that a beach parcel, even one that had some northerly upland, did not have "movable boundaries." Massachusetts law did not support the concept of movable boundaries, the court held. What were the boundaries when the property was bought remain the boundaries. The Land Court judge held that landowners whose beach property had shifted in this way did not gain any right, title, or interest to the land that had once been pond.

Surveys and title searches done for the defendant Flynn family and its grantees, in support of their side in the Land Court, also found that deeds for some of the parcels referred to actual monuments defining the northerly boundaries of certain parcels, such as fence posts – marking the boundary between a beach lot and the upland north of it. Sometimes the monument was a fence or fence post, or sometimes the monument marked the beginning of what was described as "arable land." …

**Which of the following statements about the law applicable to these facts is most likely to reflect the outcome of such a dispute in Canada?**

a. The fence constructed by Mr. Levine is a conventional boundary under the doctrine of conventional lines, described in Professesor Siebrasse's 1995 article in the *New Brunswick Law Journal*.
b. Mr. Friedman and the other Norton-White plaintiffs' would win, because their former beachfront boundary would have shifted, pursuant to principles of avulsion, as discussed in *Robertson v. Wallace*.

c. Mr. Friedman and the other Norton-White plaintiffs' would lose, because their former beachfront boundary would not have shifted, pursuant to principles of accretion, as supported by the analogous case of *Robertson v. Wallace*.
d. Mr. Friedman and the other Norton-White plaintiffs' would win, because their former beachfront boundary would have shifted, pursuant to principles of accretion, unlike the distinguishable case of *Robertson v. Wallace*.

The correct answer is D. The doctrine of accretion applies where changes the shoreline are "gradual and imperceptible" (see e.g. *Nastajus*). Unlike *Robertson v. Wallace*, in which the change in the river had been "rapid", in this case the edge of the water moved from where it was "centuries ago". A is incorrect because there was no explicit or implicit agreement that Mr. Levine's fence marked a conventional line. B is incorrect because the doctrine of avulsion holds that rapid changes in water boundaries do *not* change legal boundaries. C is incorrect because the doctrine of accretion holds that gradual changes in water boundaries *do* change legal boundaries.

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**2. The second legal strategy of the plaintiffs in the case discussed above (which you need not re-read) was to propose that Massachusetts state law be amended to convert lands created by shifting sand into public property.**

… Against the possibility of defeat at the state's highest court, there is pending state legislation pressed by Mr. Friedman and opposed by a group organized for the purpose, called the Great Ponds Coalition and affiliated with the Kohlberg side of the court battle. … The legislation would amend Massachusetts Chapter 91 to provide that the land created by the shifting of a barrier beach over the shore of a recognized great pond would not be the property of the owner, but instead would be public property, just as the pond it displaced was.

HB254, the legislation Mr. Friedman had filed, would in some cases, including his own, create a public shore at the northern, or pond, edge of the barrier beach. But, because the land surrounding the pond is privately held, there would be no effective and immediate public access to the beach.

Still, because the state may be obliged or pressured to create a public access, the legislation has uncertain, and perhaps threatening, implications for the private holdings around Oyster Pond, including the holdings of the Kohlberg et al litigants. …

The Great Ponds Coalition … describes its mission on its website thus: "… to oppose H.254, a measure in the Massachusetts legislature that would transfer private land to the public, reversing centuries of settled property law and potentially costing the state and local communities millions of dollars..."

"… The bill would transfer private barrier beach property that, due to storms or erosion, has shifted onto the bottom of the Great Ponds (any pond or lake of more than 10 acres) to public ownership. …

"The public's only role in this would be to reimburse private landowners for the land takings — an unimaginable expense for a state grappling with budget constraints."

**Which of the following statements about the law applicable to these facts is the most accurate?**

a. As in *Lucas v. South Carolina*, Bill 254 would violate the 5th Amendment of the United States Constitution, and be struck down on that ground.
b. If a measure such as Bill 254 became law in Canada, it would trigger an obligation under the *Charter of Right and Freedoms* to compensate landowners like the Kohlberg litigants.
c. If a measure such as Bill 254 became law in Canada, no compensation would be payable under provincial expropriation statutes, based on the precedent set in the analogous case of *Mariner Real Estate v. Nova Scotia*.
d. If a measure such as Bill 254 became law in Canada, compensation would be payable under provincial expropriation statutes, because these facts are distinguishable from *Mariner Real Estate v. Nova Scotia*.

The correct answer is D. Unlike *Mariner*, this seems to be a case of direct expropriation, not a regulatory taking or *de facto* expropriation, which is compensable under provincial legislation. A is incorrect; Bill 254 could only be struck down if the takings of land were not for public purposes, not pursuant to due process and not fairly compensated. The article implies that private landowners in this case would receive "millions of dollars". B is incorrect; the *Charter* does not generally protect the right to property or require compensation or due process if property is taken for public purposes. C is incorrect; this case is not analogous to *Mariner*, in which the plaintiff alleged the denial of a building permit constituted a *de facto* expropriation.

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## II. ANSWER ANY 2 OF 3 QUESTIONS IN THIS PART, WHICH IS WORTH 70% OF THIS EXAM.

**1. The following report (edited for length) was published recently in the British newspaper, *The Telegraph*. What legal opinion would you provide to a client seeking objective advice if a similar situation arose in Ontario? Explore all relevant issues and arguments.**

**Cromer Town football club's wrangle after king's death**

*By Mark Bulstrode, BBC News*

*January 20, 2012*

*It is a bizarre legal wrangle that has seen the future of an amateur Norfolk football club thrown into doubt by the death of a Norwegian monarch in 1991.*

Cromer Town Football Club was bequeathed its Cabbell Park ground in 1922 by rich local landowner Evelyn Bond-Cabbell.

But a clause stipulated that the lease would expire 21 years after the death of King Edward VII's final descendant.

When his grandchild, Norway's King Olav V, died on 17 January 1991, it was thought the countdown had begun.

But even after that deadline passed on Tuesday, the club's future is

still no clearer after the saga took a new twist.

**Genealogy checks**

Legal experts have suggested the Anglian Combination Premier Division side could have the right to remain at its current home until 2032.

Paul Jarvis, club chairman, said genealogy checks indicated George Lascelles, the 7th Earl of Harewood, was the final descendant of the king.

He died in July last year - but even his status as a descendant is far from clear cut.

Lawyers are looking into whether the agreement covered the monarch's wider family. The 7th earl was one of the king's great grandchildren.

It is also thought the earl needed to be alive at the time the agreement was made - he was born months after Mrs Bond-Cabbell bequeathed the land in 1922.

Mr Jarvis said: "This agreement was signed in 1922 and George Lascelles was born in 1923.

"But because he was in the womb at the time, our advice is that he was a legal being at the time and is therefore the final descendant."

However, another barrister has thrown doubt on that theory, prompting further debate.

…

The lease states the land should remain as public open space but be given to the local authority after the deadline has passed.

It is unclear why the clause was included.

**Post-war concerns**

…

Mrs Bond-Cabbell, who was aged in her 90s when she died in 1954, left the four-acre (1.6 hectare) site and money to the local community after World War I after becoming concerned about the plight of men returning to Norfolk.

She also funded the building of Cromer Hospital, where many of the returning soldiers gained work.

Mr Cabbell Manners said: "My great grandmother's view was to make a community asset to be used by as many people as possible.

"My role is to make sure this continues."

He said he did not want to comment on whether he wanted the football club to remain at its current home.

Philip Burton, chief executive of the council, said: "This is a complex issue involving a number of different interests.

"The district council is working with everyone involved to try to bring the matter to an amicable conclusion."

This question required thorough application of the law pertaining to future interests and qualified transfers of property. Students' first step should have been to identify key parties in the chain of title and characterize the legal nature of the transfer document and qualified future interests. From the term "bequeathed" we know that we are dealing with a testamentary transfer of land.

Ms. Bond-Cabbell was the testatrix. Cromer Town Football Club is apparently the beneficiary of a leasehold interest, not a fee simple. The 21-year sunset clause on the Club's lease was put in the will to comply with the rule against perpetuities. The crux of the current legal problem is determining the perpetuities period, which depends on who were "lives in being" at the time the interest was created, i.e. at Ms. Bond-Cabbell's death. No mention was made in the report of applicable perpetuities legislation in England; students would be rewarded for putting that caveat in their answer. Regardless of the resolution of the perpetuities issue, students ought to have also dealt with the qualification that the land "should remain as public open space" and then be given to the local authority. Was this qualification binding, or merely a hope, which was one of the possible characterizations of the gift-over to the Christensens mentioned in *Martini v. Christensen*? Did this gift-over to the local authority fail as "repugnant" like in *Walker* or was it consistent with the Club's leasehold interest like the life estate in *Taylor*? (Probably the latter.) Is the qualification that the land should remain public open space impossible? Probably not. It almost certainly does not offend public policy, like *Leonard* or other cases we studied. But is it too uncertain to be enforceable, or is it clearer than the residency requirement at issue in *Hayes v. Meade*? Since this seems more like a condition subsequent or determinable limit than a condition precedent, a court must be able to "see from the beginning, precisely and distinctly" what event would determine the end of the Club's lease. Fully addressing the future interests issues might also require characterizing the clause as either a condition subsequent or determinable limitation. The ambiguous language makes it hard to tell, but perhaps the dominant intention of the testatrix would influence a judge, as with the similar qualification at issue in *Caroline v. Roper* (that the land shall revert if used for other than a community centre). Ultimately, the outcome of that case, and others like *Unger v. Gossen*, suggests that, regardless of all the legal technicalities, this land might remain a public space, like the testatrix intended.

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**2. The following report (edited for length) was posted on the "Streams of Consciousness" blog hosted by the magazine *Scientific American*. How are these scientific findings from the field of psychology related to the conceptual justifications for property law that we have studied this term?**

**Toddlers Stand Up for Property Rights**

*By Ingrid Wickelgren*

*November 20, 2011*

People are particular about their things. Property—who owns it or did what with it—is the subject of many a legal battle. It's odd to me how attached people get to objects and how emotional they become when someone messes with their stuff. Yet we take notions about sharing and rules such as "don't take what is not yours" very seriously—so much so that grownups get upset when kids seem to flout them. So it might help to realize that an understanding of ownership has its own developmental trajectory, one that psychologists are just beginning to work out.

Obviously, a baby doesn't care who owns the rattle she is shaking—or the dress she is wearing. But babies don't express

any opinions at all, really, and it's obvious when they chew on your book, that they mean no disrespect. By age two, suddenly, that baby christens everything in the room "Mine!" But although she seems to have an idea of things belonging to her, she cannot fathom the possibility of an object belonging to someone else. So by default, she decides everything is hers. She isn't selfish; in her mind, there can be no other possibility. At the age of three, she may no longer be the owner of all that she sees. But she is hardly wise in the ways of stuff. If she had a hand in making something, it is unequivocally hers, no matter that the material used to construct the masterpiece was not. …

A new study published this month … is a small piece in the emerging puzzle of how children's concept of property develops. Kids might first learn that possession can take on different forms, the authors suggest. So they might discover early on, for instance, that being given something is different from borrowing it. Children might also get some idea about what true ownership implies—for example, that you have more say in what to do with something if it is officially yours. Later, kids may grapple with complexities. Although researchers are not sure which specific concepts kids get first, three-year-olds are already showing some understanding that property rules are made by the larger social group and that these social norms are important. They will even enforce these larger group rules whenever individuals break them.

The social perspective gives me a better sense of what these kids are learning about property. Some researchers say our feelings about objects stem from the fact that we consider things to be extensions of ourselves. But I find it easier to get my mind around this idea if there's a social context. To me, people are so much more important than things. When social rules guide our relationships toward objects and what we are allowed to do with them, then breaking the rules puts holes in the social contract—and the act becomes personal. When someone gives something to me, if that person is special, the object becomes special. So to me it makes sense if the development of the property parts of our brains is tied to the social parts. It may take a while to learn the social code, but perhaps it is that code that gives objects their emotional significance. …

This question invited students to address the two dominant theoretical paradigms underpinning property rights: natural rights and positive law. The psychological research discussed in the article suggests that the utilitarian, economic or market-oriented rationales applied so often throughout our course are not the only plausible justification for private property. Students could have constructed a thesis for their answers by expressing personal agreement or disagreement with that premise. Students who merely describe various theories of property law without

organizing the discussion into an argument would not perform well on this question. Students who not only constructed an argument but also linked it to specific references in the article would do much better. For example, the belief that if a child "had a hand in making something, it is unequivocally hers" reflects Locke's labour theory of property. Researchers who "say our feelings about objects stem from the fact that we consider things to be extensions of ourselves," reflect the personhood theories of Hegel and Radin. There is in the article, however, also some overlap with utilitarian theories. The statement, "[w]hen social rules guide our relationships toward objects and what we are allowed to do with them, then breaking the rules puts holes in the social contract," is somewhat like de Soto's view that property rights are the foundation of the rule of the law. Overall, the article strongly supports the argument that property is about more than markets, as theorists like Posner would suggest. Students who performed the best on this question would not have stopped there, however, but would have linked these theories to specific cases materials we studied in the course, as examples of their application in practice. This could have involved linking the labour theory to cases like *INS v. AP* or *Edwards v. Sims* (or many others), or personhood theory to issues such as moral rights in *Théberge*.

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**3. In a paper called "Digging Below the Surface: The Story of Beneath the Great Onyx Cave Cases," Bruce Ziff discusses Richard Epstein's analysis of six potential rules that could have been applied to the facts of *Edwards v Sims*.** Epstein noted that the court might confer ownership on:

a. The owner of the surface (as the Court held).
b. The discoverer of the cave.
c. The owner of the entrance.
d. Co-ownership of the entire cave based on the surface title proportions.
e. The party most willing to buy out the claim of the other party.
f. The state.

**Based on the concepts and principles studied in our property law course, which of these possible rules would you prefer and why?**

This question comes directly from casebook. That is not uncommon on my exams, but it is rare that the question would be as direct as this one was. Reading Professor Ziff's opinions on pages 194-8 will provide you with an overview of the minimum level of discussion necessary for an acceptable answer to this question. This includes grappling with the relationship between each possible rule and the justifications for private property, including especially economic efficiency but also other values such as environmental preservation. In that context, students would be expected to explain the implications of each rule, based on various factual assumptions. Students would not, however, be rewarded for merely repeating Ziff's observations. It would have been necessary to build on Ziff's comments with independent analysis, including especially a well-justified personal opinion about the preferred legal rule. Students should also have discussed the application of their preferred rule in the specific context of *Edwards v. Sims*. Even better, students would have expanded their analysis to explore how the rule would operate in related circumstances, such as airspace disputes like *Didow* as one example.

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**THE END.**