PROPERTY: SECTION IIIB

Professor Donahue

January 8, 2000

10:30 a.m.—4:30 p.m.

PART III — INSTRUCTIONS

This is the third part of the examination, the essay question. You may use your casebook and any other material that you wish. Collaboration is not permitted. Please do not discuss this question with anyone until 4:30 p.m. today. Please put your student identification number on the front cover of your blue-book or at the top of your typewriter paper.

This portion of the exam is "take-home." After you have turned in the objective and short-answer questions (Parts I and II), you may take it any place that you wish. It must be turned into the take-home exam window in the Registrar's Office (location to be announced) between 3:30 and 4:30 p.m. today.

Every study of examination grading indicates that there is a strong positive correlation between high marks and clarity of handwriting. If you handwrite your answer to the question:

(1) Please write clearly.

(2) Please skip every other line in your bluebook (I don't care if you write on both sides of the page).

(3) Please observe the margins in your bluebook.

Terre de bois Ygrec [Woodland Y] is a tract of land of approximately 200 acres in the township of Englishman's Butt in the northern portion of the state of Harkness, a United States state that bears a remarkable resemblance to the state of Maine. It was occupied by a family named Ygrec, who escaped from Acadia in 1755. (Relatives of theirs figure prominently in Longfellow's poem "Evangeline.") It is unclear whether the Ygrecs ever obtained a patent for the land, but the original family and its descendants were in occupation of the land from 1755 to 1970, when our story begins. The family eked out a living farming potatoes and engaging in occasional logging operations. These operations were sufficiently small scale that the Appalachian Mountain Club (a "green," non-profit organization that represents the interests of hikers and campers) still characterizes the land as "old-growth" forest, one of the relatively few such tracts that remain east of the Mississippi.

In 1970, Albert Ygrec, seeing his brood of twelve children scattering to the four winds and sensing that his end was near made a will, which you may assume was valid in form, disposing of the property:

"I leave my real property wherever situate to my daughter Béatrice for and during her natural life. Upon her death, her executor is to convey the property to whomever and as many of my lineal descendants who will agree to speak nothing but the French language and who will maintain the premises in the way that we have maintained them for the last two hundred years. *Harkness libre. Vivent les français.* [Free Harkness. Long live the French.]"

The residuary clause of will gave "all the rest and residue of my property, both real and personal, wherever situate to the Association des francophones de Harkness [Society of French-speakers of Harkness], Inc., a non-profit corporation, incorporated under the laws of Harkness, and having its principal seat in London [the state capital]."

At approximately the same time Albert had recorded in the local registry of deeds the following document, which you may assume was formally entitled to record:

"RESTRICTIVE COVENANT

"The property known as Woodland Y (there followed an adequate legal description of the land) may not be occupied by anyone who does not speak the French language. This restriction shall run with the land and shall bind my heirs, successors and assigns. This restriction may be enforced by any of my lineal descendants or by the Association des francophones de Harkness. *Harkness libre. Vivent les français.*"

Albert died shortly after these events, having been predeceased by his wife. His will was not probated, a fact that you are to assume does not affect its validity. His children, Béatrice and her brother Clément, and their spouses and children, remained in possession of the land, their ten brothers and sisters having departed for parts unknown. The Association des francophones de Harkness got approximately $1000, all that was left of Albert's liquid assets after his debts and funeral expenses were paid. From their father's death to today, Béatrice and Clément have lived on the land, paid the taxes, and earned a modest living from farming and taking in hikers and campers from Massachusetts. (The area does not support skiing, but there is some snowmobiling, winter camping and fishing for the really hardy.)

In 1975, Béatrice and Clément, seeking to improve the meager returns that were earning from the land entered into a 50-year lease with the Weyerhaeuser Lumber Company. The lease, which you may assume was formally valid, gave the company possession of approximately 125 acres of woodland and the right to take timber from the land. Rent was fixed at $1000 per year plus a 10% royalty on the market value of all timber taken. These 125 acres included a logging camp, which contained (and still contains), five cabins for use by lumber jacks, while they were

harvesting the trees on the land. The cabins were at the time of lease in run-down condition, and there was, of course, no plumbing or electricity. Weyerhaeuser basically continued the practice that the family had had for many years of cutting down only lumber-grade trees. (It did this by licensing small-time woodcutters; it did not do so itself.) It also used the camp as short-term residences for its employees while they were engaged in cutting operations on other properties in the area. Weyerhaeuser was, in fact, covertly engaged in a program to buy up or lease large tracts of woodland in the area. By 1995, it had accumulated several thousand acres of woodland in the area. It announced a plan to clear-cut it all.

The town council of Englishman's Butt was mightily concerned by this announcement. Much of the outside revenue that the town receives is dependent on hikers and campers who come to the area because of its large tracts of woodland. Clear-cutting would obviously adversely affect, if not totally destroy, that revenue. There are also those in the town who were concerned about the environmental effects of clear-cutting. (The matter is controversial. Lumber companies maintain that if clear-cutting is properly done, the area can then be reseeded and will recover its forests quickly. Others maintain that clear-cutting causes permanent environmental damage to the land, and that it never recovers, or, at least, that it never recovers the ecology of the "old-growth" forest.)

The town reacted to this information by amending its zoning ordinance to create a new "Special Forest Zone." In a Special Forest Zone land use is limited to "forests, woodlands, and accessory uses." "Accessory uses" are defined to include hiking paths, dirt access roads for lumbering equipment, lumber camps, and camps for hikers. A special feature of the ordinance is that existing lumber camps are required to be kept in good repair, and their historical features kept in tact. Many of the lumber camps in the area, including the one on Terre de bois Ygrec, are over a century old, and hikers visit them to get a sense of how logging operations in the past were conducted. Designated as a "Special Forest Zone" under the ordinance was all the land owned or leased by Weyerhaeuser. You may assume that the original zoning ordinance was validly adopted and that the adoption of the amendments was procedurally correct (i.e., the requisite notices and hearings took place).

Weyerhaeuser, of course, objected to the ordinance and is concerned about its effect now that it has been adopted. Historical maintenance of the lumber camps will be costly, perhaps costly enough that it will tip the balance between profitable and unprofitable logging operations. Weyerhaeuser is particularly concerned, however, about another aspect of the ordinance. Logging in a Special Forest Zone is confined to trees suitable for lumber. This restriction not only prevents clear-cutting. It also prevents the harvesting of Christmas trees, firewood (an exception being made for trees that fall down in storms and for underbrush), etc. Weyerhaeuser maintains that if it cannot clear-cut (or engage in some quite radical form of harvesting short of clear-cutting), it cannot turn a profit on its logging operations in the area, and, hence, the land that it has so carefully bought or leased is valueless to it.

Another recent development in the law of Harkness may be relevant to the case. In 1997, the Supreme Court of Harkness, in the case of *Jones v. Thibault*, announced a change is the law of waste in the jurisdiction. Previously, like most states in the United States, Harkness had adhered to the doctrine that the cutting of trees was not waste. The new doctrine adopts a version of the English rule on the topic: the cutting of "great trees" is presumptively waste. The opinion was sophisticated: "Proof of cutting of great trees (a term which further jurisprudence will have to define)," the court said, "shifts to defendant in the waste action the burden of showing that he or she did not reduce the capital value of the land by so cutting. Our

abandonment of the English rule of waste in 1820 was premised on the great difference between English and American ecology at the time. We still do not have an ecology quite like that of England, but in the intervening years we have tamed our forests, so much so that the forests are now in serious danger. This is particularly true of the relatively few 'old-growth' forests that remain in the northern portion of our state."

On December 1, 2000, the following actions were filed in the Circuit Court (a trial court of general jurisdiction) in the county in which Terre de bois Ygrec is located.

Béatrice and her brother Clément sue the Weyerhaeuser Lumber Company for failure to pay the rent owing under the lease for preceding six months. Weyerhaeuser's answer admits the non-payment of rent and raises a counterclaim under the *Javins* doctrine, which Harkness has recently adopted. Since the lumber camp is a residence, Weyerhaeuser claims, and is far below the standard of habitability under the relevant housing code, Weyerhaeuser does not owe any rent until the premises are brought up to code.

Béatrice and Clément's ten brothers and sisters, their forty-three children, and the Association des francophones de Harkness sue Béatrice, Clément, and Weyerhaeuser in waste and to enforce Albert's restrictive covenant. The grounds for the latter action are that many of Weyerhaeuser's licensees and employees who have occupied the logging camp are not French-speakers.

The town of Englishman's Butt sues Béatrice, Clément, their spouses and children, their ten brothers and sisters and their forty-three children, the Association des francophones de Harkness, and Weyerhaeuser for a mandatory injunction to maintain the logging camp up to the standards prescribed in the Forest District ordinance and for a negative injunction to prevent the clear-cutting proposed by Weyerhaeuser and to prevent any of the defendants from engaging in any forestry operations other than those permitted under the ordinance.

You have the misfortune of being the law clerk to Judge Ferocious, before whom all these cases are pending, and whose disposition has not improved with age. "I want to know what the issues are in these cases," he says. "I'm not interested in every possible issue a fancy Harvard lawyer could think of, and I'm certainly not interested in the issues that might appear when more facts are discovered. What I want to know is what, as you see it, are the core issues that are at stake on the facts as we know them. You also should know that we owe a lot to the Weyerhaeuser Lumber Company in this state, and those guys in Englishman's Butt are nuts. Half of them don't speak English, and the other half are pointy-headed liberals from Massachusetts who would, if they could, shut down logging in this state, so that they can sit in woods and look at the mushrooms. I don't, however, want to do something that will get me overruled 7-0 by the Harkness Supreme Court or 9-0 by the U.S Supremes." "Also," he concludes, "there are far too many parties in these cases; we've got to get rid of some of them; so you'd better start off by telling me who the hell owns Woodland Y."

Harkness has the following statutes:

(1) A common-law reception statute. (1785).

(2) A married women's property act. (1850)

(3) A twenty-year statute of limitations on actions to recover real property (1850).

(4) A race-notice recording statute. (1850)

(5) A zoning enabling act (1930), which closely tracks the Standard State Zoning Enabling Act (DKM3, pp. 1028-31).

(6) An intestacy statute, most recently amended in 1990, which provides that property of an intestate decedent, who is not survived by his or her spouse, goes to his or her

surviving children as tenants in common.

No state case law is directly relevant to the issues in this case, with the possible exception of the *Jones* case and the state's adoption of the *Javins* doctrine, mentioned above. As a general matter, the state has taken a middle-of-the road course both in the private law of property and in the public law. Quotations from the most recent *Restatements of Property* are frequently found in opinions of the Harkness Supreme Court, but the court has as yet taken not position on whether it will follow the *Restatement Third* on servitudes or the *Restatement Second* on perpetuities. The court's attitude toward zoning ordinances is neither as permissive as that of the California courts nor as restrictive as the courts in New York sometimes are.

Write the memo for Judge Ferocious. (One more note on Judge Ferocious: He's not stupid and is quite well educated. He can understand a sophisticated argument, but he bristles at the use of what he regards as "high-faluting" non-legal terminology. Hence, if the argument is relevant, you might want to say something like "if we follow the principle that no one should be made worse off as result of government action" rather than "if we take a Kantian approach to scientific policy-making.")

* * *

"Evangeline: A Tale of Acadie" by Henry Wadsworth Longfellow, lines 1-6:

This is the forest primeval. The murmuring pines and the hemlocks,
Bearded with moss, and in garments green, indistinct in the twilight,
Stand like Druids of eld, with voices sad and prophetic,
Stand like harpers hoar, with beards that rest on their bosoms.
Loud from its rocky caverns, the deep-voiced neighboring ocean
Speaks, and in accents disconsolate answers the wail of the forest.

For the rest of it, go to Hollis E-resources, click on "American Poetry (Lion)" and enter "Evangeline" on the title line of the search engine and "Longfellow" on the author line. You probably, however, should wait to do this until after you've turned in the exam.

THE END

30 January, 2001

MEMORANDUM

TO: Property Section 3B

RE: The Exam

I thought that the exams were good. No one failed. No one came even close to failing. There were a few dismal performances on individual parts. But those that did badly on one part compensated for it by what they did on other parts.

If you want to see your exams, they are in my assistant's office (Kate Farrington, Hauser 518). You'll have to show her your ID card, since they are arranged by ID number. If you want to see me about the exam, I will hold special office hours on Thursday, February 13, from 2 to 4. There's a sign-up outside my office door, and please bring your exam with you when you come. Since the three middle grades (B, B+, and A-) into which the bulk of the class falls are "curved," I will probably not be able to tell you very much about why you fell on one or the other side of the line represented by those grades. (I know that many of you will find a "B" disappointing and an "A-" quite satisfactory, but my colleagues insist on three categories, and I don't know of any way to create them other than statistically.) I do think I might be able to help if you got a grade of B- or below.

There's relatively little that one can say about the objective and short-answer parts other than that as a group you did as well as classes taking the exam in the spring have done on the same or similar questions.

On the short-answer questions, I was a bit disappointed that more of you didn't come straight out and say that the result in *Deterding* is mighty odd. One can argue back and forth on the easement vs. fee question. The dissent clearly has the better of the argument as matter of traditional interpretation (see DKM3, pp. 893-4), but one can see how a court might have wanted to protect Ms. Hamilton and Ms. Deterding, particularly if, as I suspect the court suspected, Mr. Anderson was acting as the surreptitious agent of the Army Corps of Engineers. What is hard to see is how the United States owes any *contractual*

obligation to Deterding (or how Anderson owed one to Hamilton). If I sell you Brooklyn Bridge, the Triborough Authority does not, at least not normally, have a cause of action against me. It will just stop you from trying to take possession of the bridge.

That, in turn, leads to this possible scenario, which may have been what the court had in mind: The Amerada Oil Company cancels its lease with Deterding and enters into a compensatory royalty arrangement with the U.S. The U.S., in fact, does not have the right to drill, and Deterding is now under no contractual obligation with Amerada not to drill. So what should she do? Drill, of course. But if she does will the U.S. say that the drilling interferes with the navigation project? And won't it be tempted to do so, because that would protect its royalties? A few of you seemed to be playing around the edges of this possibility, though no one came right out and said it.

I was quite pleased with the results of the essay question. Giving you a whole day to do it greatly improved the clarity of the answers (and their legibility). It also meant that most of you saw the "core issues." The spread in the results, for the most part, were based on how well you treated them. I'm attaching one of the better answers as a "model." It misses a few things (discussed below), but, by and large, it was very good.

Almost everyone organized the essay around six issues: (1) Who the hell (in the immortal words of Judge Ferocious) owns Woodland Y (aka, in French, Terre de bois Ygrec)? (2) Does Weyerhaeuser (W) have a valid defense to the action to recover rent under the *Javins* case? (3) Does anyone have chance of prevailing in a waste action against Béatrice and/or W? (4) Can anyone enforce the covenant that Albert Ygrec had recorded? (5) Can Englishman's Butt limit lumbering operations on Woodland Y in accordance with its recently adopted zoning ordinance? (6) Can Englishman's Butt require (whom?) to maintain the logging camp in its historical condition? (Some of you combined items (5) and (6). That was probably not a good idea.)

Let me take it issue by issue.

(1) (a) The Ygrec family escaped from Acadia (in Canada) in 1755 when the British rounded up all the French-speakers and sent them off to Louisiana. (They didn't get quite everyone; some of them are still there.) The Ygrecs moved to the mythical state of Harkness, which is remarkably like northern Maine, and settled on two-hundred acre parcel, where they've been ever since. Absent any further facts, it certainly looks as if they've run out the statute of limitations against any possible

private owner. But adverse possession does not run against the state. No patent is known. Hence, title may rest in the state of Harkness (in the west, except for Texas, it would be the U.S.). It is certainly possible that a court would bar the state of Harkness by employing the fiction of a lost grant. But--and I was disappointed that no one saw this--possession is good title against the whole world except the true owner, who is not a party to any of the suits here involved. So we proceed as if the Ygrecs owned the land, even if it's possible that they don't.

(b) Albert made a will which was not probated, but which you are to assume is valid. (Don't fight the facts, as some of you tried to.) It gave a life estate to Béatrice; that's perfectly o.k. What happens after the life estate is odd: "Upon her death, her executor is to convey the property to whomever and as many of my lineal descendants who will agree to speak nothing but the French language and who will maintain the premises in the way that we have maintained them for the last two hundred years." As most of you saw, this is a classic violation of the common-law rule against perpetuities. The executor is not necessarily a life in being, and he may be appointed more than 21 years after Béatrice dies. The violation is more blatant than that in *Ryan*, because, as a number of you pointed out, the executor, presumably, has to figure out which of the descendants will agree to the terms of the grant. Since there's no forfeiture penalty mentioned, a court will certainly not read one in. There is even more reason in this case than there was in *Ryan* to think that the executor is not merely a conduit; he or she really has something to do.

Some of you thought that the remainder/executory interest (or is it neither, but a power in the executor?) also violated the rule against perpetuities because descendants could keep coming forward and agreeing to the conditions. My own view is that the presumption of vesting probably solves this problem. That is to say, only those descendant who are living at the death of the life tenant would qualify for class membership.

Now, of course, if we take a wait-and-see approach, it is virtually certain that the executor will be appointed and do his job within twenty-one years of Béatrice's death. Similarly, if we take a *cy pres* approach, we could simply write in a twenty-one year term of years, within which the executor must be appointed and do his job. But you are expressly told that Harkness has not yet adopted either approach to perpetuities. A trial court should be reluctant to make this radical a change in the law on its own account, and this is not a particularly

appropriate case to do so (because the will, to describe it most charitably, is eccentric).

So what do we do now? If we take the approach of *Ryan* (and, in an analogous situation, of the *Independent Baptist Church of Woburn*), we imply a reversion in the devisor, which then passes by the residuary clause of the will to the Association des francophones de Harkness (AFH). Alternatively, we might ask the question whether a little dose of "infectious invalidity" might help this situation. Here the problem is not the life estate in Béatrice (that clearly seems to be what the testator had in mind), but there are pretty clear indications that the testator really wanted his descendants to have first dibs on the property. We can come close to achieving that not by invalidating the life estate but by invalidating the implied remainder in AFH. That leaves Albert intestate so far as the remainder is concerned, and it passes to his children under the Harkness intestacy statute. Some of them will be dead by the time that Béatrice dies (she will, of course, be dead), but the remainder will simply pass to their heirs or devisees, free of the eccentric conditions.

Many of you saw some of this; very few of you saw all of this. I gave a lot of credit to those (the "model answer" was not one of them) who saw that there were two possibilities. The one thing that I think is highly unlikely in this situation is that a court would expand Béatrice's life estate into a fee. That is almost never done (DKM3, p. 483).

Are we home free now? Well, not quite. Béatrice and Clément have been living on the property for thirty years and behaving like owners. Can they build a case for adverse possession (presumably as concurrent owners, since they have clearly not been possessing adversely against each other)? Normally, a life tenant cannot adversely possess against a remainderman, unless he or she does something that gives notice that he or she is holding adversely. Similarly, a sib who resides with sib who is owner of the property is normally assumed to be residing there with the sib-owner's permission. That's as far as anyone took it. I was hoping that someone might see the argument that Béatrice and Clément did do something that might be said to have put the other descendants on notice that they were holding adversely to them. They leased a hefty portion of the property to W for a term of fifty years together with a profit to take timber. It's a thin reed, but it's there. Those are acts of fee owners not acts of a life tenant whose brother is living with her. Clearly facts would need to be developed about what B and C thought they were doing

and what got communicated to the sibs and their families, but the issue is there.

(2) Any court that applied *Javins* to W's lease has got to be crazier than most courts are. This is a commercial lease, the principal purpose of which is to convey timber rights. W is a powerful company leasing from small-time farmers. As between the two parties they are at least as capable and probably more capable of maintaining the cabins. The lease doesn't even mention the cabins. The cabins are not "residences" as that term in normally understood. The fact, as one of you pointed out, that the town is requiring that the cabins be maintained in their historical condition is a clear indication that they do not regard them as being subject to the housing code. Most of you came to the conclusion that *Javins* would not apply. A few of you tried to waffle. I wouldn't waffle on this. Whether W's employees and licensees have a claim against W is another story, although the situation is substantially different from that of migrant labor camps. But that is not a suit that is before us.

(3) Anyone who has a valid future interest (that is, either AHF or the sibs) can bring a waste action. Under normal American law, the kind of timber-cutting that W has been engaged in up until now is not regarded as waste. Clear-cutting probably would be regarded as waste, unless the land was going to be developed (and even then it might be regarded as "ameliorative waste"). Exactly what the effect of *Jones v. Thibault* is is hard to tell. On the one hand, the Harkness Supreme Court seems to have cut back substantially on the normal American rule. On the other, its focus on "capital value" would suggest that it has also cut back on the notion of ameliorative waste. But the court's remarks about "old-growth" forests suggest that it has environmental concerns in mind, and, needless to say, environmentalists like the idea of ameliorative waste. Many of you puzzled over the meaning of the term "great trees" in the opinion. That's my fault. I should have defined it. The kind of trees that W is taking for lumber would definitely be "great trees" as that term is defined in England. The Harkness court obviously waffled, apparently wanting the make the definition vary depending on whether the trees were in "old-growth" or replanted forests.

Many of the answers assumed either that the suit would be about the lumbering operations to date or about the proposed clear-cutting. You obviously get to quite different results depending on which of the two you focus on. I would be more inclined than many of you were to hold that the lumbering operations to date constituted waste under the new definition. I have relatively little doubt that the proposed clear-cutting

would. Equity will intervene in waste cases, and where a tenant (here W) has announced plans that, if carried out, would constitute waste, an injunction, even in advance of the fact, is probably appropriate.

The problem is, of course, that W has a perfect right to take timber under its lease from B and C and may have the right to clear-cut under that lease. A few of you argued, and you may be right, that the future-interest holder could only sue B. She, in turn, has to proceed against W. The problem is what if a court determines that she authorized W to commit what the court now regards as waste? Forfeiture is a distinct possibility.

Finally, there's nothing in the *Jones* case that suggests that the ruling should be prospective only. This is a common-law decision, and common-law decisions are normally retroactive unless the rendering court specifically makes them prospective. (The constitutional concept of *ex post facto* law, you will find, normally applies only to criminal law.)

(4) The covenant issue is based on a real case, from a set of "covenants and restrictions" appended in 1998 to the deed of the Delta Plantation in Jasper County, South Carolina. The restrictions begin:

"1. The property shall never be leased, sold, bequeathed, devised, or otherwise transferred, permanently or temporarily, to any person or entity may be described as being part of the Yankee race. 'Yankee', as used herein, shall mean any person or entity born or formed north of the Mason-Dixon line."

More of the restrictions are in the attachment to this memo, and the author of the e-mail to me (a former student named Al Brophy) has written a great article on the topic: Alfred L. Brophy and Shubha Ghosh, *Whistling Dixie: The Invalidity and Unconstitutionality of Covenants against Yankees*, 10 VILLANOVA ENVIR'L L.J., 57-89 (1999).

The instinct of most of you was that the "covenants" at stake in the instant case are not enforceable. I must confess that that is my instinct too, although it may be a little harder to get to that result than some of you thought. In the first place, I agree with those of you who said that these "covenants" are not "covenants." No one ever agreed to them. Albert didn't make a deal with anyone. He just recorded them. The problem with stopping there is that that's typically what a developer does when he files a bunch of deed restrictions along with a plat for the land. The agreement, if it may be described as such, doesn't happen until someone purchases a piece of the

property with notice of the restrictions. Such person is deemed to have agreed to them. Here, however, no one purchased the property. It was devised. So the question is whether the devisees can be bound by the restrictions if they take possession under the devise. (I think that it is pretty clear that if they acquire title by adverse possession they are not bound by the restrictions.)

The AFH does not have any interest in the land (unless the implied remainder gives them an interest) or in neighboring land, so, at least so far as they are concerned, the benefit is held in gross. That would be enough to prevent their enforcing them in England, but that's not the general American rule.

I agree with those of you who thought that that there might be privity problems with enforcement at law, but clearly it's equity that has to be our principal focus here. So the question is did W (who is the only party being accused of violating the restrictions) have notice of the restrictions? Well, they were recorded. But could you find them in the recording system? There's no recorded patent (we know that), and there's no mention of any transaction that was recorded other than the "covenant." When W came to take its 50-year lease what did it find in the recording system? We know that it did not find A's will because it was never probated. Did Béatrice show them the will? If she did, would that have put them on inquiry notice to look in the recording system to see if Albert conveyed the property to anyone else? It's not an easy question, and virtually everyone missed it.

Almost everyone did see, however, that the content of these covenants is such that there are policy reasons why we would not want to enforce them. They do not, however, with apologies to those who thought that they did, constitute a direct restraint on alienation. They are carefully drafted to apply to those who occupy the property not to those who buy it. (Hence, one could argue that even if not a single officer or director of W speaks French, that's not a problem.) Clearly, however, the policy against restraints on alienation applies. Limiting the occupiers of the property to those who speak French, even in northern Harkness, where quite a few people do speak French, considerably cuts down on potential buyers.

Further, there is the policy of *Shelley v. Kraemer*. Again, there are very few cases that refuse to enforce covenants because of their potentially unconstitutional content, except where race is involved. Race is not involved here. (There are probably more black francophones than white ones, though most of them live in Africa and might not be potential purchasers of

tracts of land in the northern woods.) Language is involved, and there are more than hints of ethnicity, but the case is not an open-and-shut one under *Shelley*.

Nor, in my view, is the case an open and shut one under the 1968 Civil Rights Act. (Here, however, I did not expect you to go, because we treated the fair housing laws so cursorily.)

So, I am forced back to the traditional "touch and concern" requirement and its modern policy analogue, "unenforceable as against public policy." This may make Judge Ferocious uncomfortable, but I think I can persuade him to craft a narrow opinion, informed by the policy considerations mentioned above, which says that we will not enforce a covenant requiring that the occupiers of a particular piece of property speak a particular language, where that covenant is likely to have a substantial effect on the alienability of the property and where there is no limit on its duration or mechanism for change.

Like many of you, I think that there is also an issue as to whether the licensees and employees of W are "occupiers" within the meaning of the restriction.

(5) On the zoning issue generally I was disappointed that so few of you took the hint that Judge Ferocious gave you (and which we talked about a lot in the *Preble* case) that the problem with these regulations may not be their constitutionality in the abstract but rather whether Englishman's Butt is the right governmental agency to promulgate them. Taking this general concern down to the specific, is there any indication that Englishman's Butt has been given authority by the state either to regulate the lumber industry generally or to engage in historic preservation? There is no indication that they have home-rule power; there is no indication that they have specific legislative authority to regulate the manner in which timber is taken, and, of course, there's nothing like the specific historic preservation legislation that was at stake in *Penn Central*. True, the *Stoyanoff* case did hold that the SSZEA authorized architectural control in Ladue, but that part of that case is certainly open to criticism.

So far as the regulations on cutting are concerned, most of you saw the basic issues. There may or may not be a comprehensive plan. That depends on whether W owns all the forest in the town (in which case it is perfectly appropriate to pass a regulation that only applies to them), or, if it does not, whether a reasonable planning effort was made to find all such property (or simply a panicked reaction to W's announcement). We clearly need more facts here.

W may or may not be entitled to continue what it has been doing as a non-conforming use. It probably is. But that does not include clear-cutting.

The reasons offered by the local legislature are well within the traditional range of the police power: encouraging the local economy by encouraging tourism and preventing environmental damage. The fact that the environmental issue is controversial makes it even more, not less, appropriate for legislative resolution, though one would certainly like to see a more high-powered legislature than the town council of Englishman's Butt doing it.

If we apply the Sax distinction between the government acting as arbiter between two competing land uses and the government acting on its own account to this situation, it seems pretty clear that the former is at stake. Recreational use of land and use of it for timbering operations are potentially conflicting; the town has stepped in and tried to tilt the balance in favor of recreational uses, but it certainly has not banned all timbering. As applied to a particular piece of property that might lead to a finding of taking, but you are expressly told here that lumber-grade timber can be gotten out of this parcel without clear-cutting, and we know that the parcel is suitable for recreational uses. This situation looks as if it is a long way from *Mahon* or *Lucas.*

I also agreed with those who said that under current U.S. Supreme Court doctrine the relevant parcel to consider in judging the impact of the regulation is the fee as a whole (B's and W's interest put together). The fact that W alleges that it can't make money on its timbering operations without clear-cutting does not mean that no one can make money on the parcel as a whole. Indeed, prior to the lease to W, B and C had been eking out an admittedly meager living from the land with a combination of farming, small-time logging and tourism.

(6) Many of the same considerations apply to the validity of the historic preservation ordinance, though there are some additional factors: In the first place, there is the question mentioned above whether Englishman's Butt has the authority to engage in historic planning. In the second place, there is a question as to how far this ordinance goes. A requirement that a designated historic structure be kept in "good repair" is a standard feature of historic preservation ordinances (it was feature of the one involved in *Penn Central*). Whether the requirement in this ordinance that the "historical features [be] kept in tact" goes beyond that is not completely clear. There

is also a possible overbreadth in the ordinance in that it seems to encompass all lumber camps, not just the historical ones.

I gave some credit to those who argued that we need to know whether there is a general plan for historic preservation and not just a spot ordinance applied to these lumber camps. I can, however, imagine that a small town might argue that the historic camps were the only feature that it had worth preserving.

The principal constitutional problem, however, with this ordinance, at least in my view, is one that very few of you mentioned. Most historic preservation ordinances deal with buildings or features that are readily visible by the public making use of public rights of way. Grand Central Terminal, for example, can be viewed from dozens of different angles. Lumber camps, on the other hand, are frequently buried deep in private property. (If you know something about hiking, you will know that hikers frequently don't pay much attention to property lines, and lumber companies frequently don't make much effort to keep out hikers. The fact is, however, that W certainly could forbid the access of the public to the camps.) So the question is whether this ordinance is open to challenge on the ground that it attempts to force W to open up the camps to the public (by requiring that it expend money to repair them, money that it can only recover if it opens them to the public). I am not saying that this argument is a sure winner for W. What I am saying is that granted the U.S. Supreme Court's "fetishistic" concern with trespassory invasions, there my be an issue here.

Charles Donahue, Jr.

Attachments:
1. "Model" Answer
2. Delta Plantation Covenants

Professor Donahue

January 12, 2004

10:30 a.m.-4:30 p.m.

PART III - INSTRUCTIONS

This is the third part of the examination, the essay question. You may use your casebook and any other material that you wish. Collaboration is not permitted. Please do not discuss this question with anyone until 4:30 p.m. today. Please put your student identification number on the front cover of your blue-book or at the top of your typewriter paper.

This portion of the exam is "take-home." After you have turned in the objective and short-answer questions (Parts I and II), you may take it any place that you wish. It must be turned into the take-home exam window in the Registrar's Office (location to be announced) between 3:30 and 4:30 p.m. today.

Every study of examination grading indicates that there is a strong positive correlation between high marks and clarity of handwriting. If you handwrite your answer to the question:

> *(1) Please write clearly.*
>
> *(2) Please skip every other line in your bluebook (I don't care if you write on both sides of the page).*
>
> *(3) Please observe the margins in your bluebook.*

Matthew Arnold's poem, *Sohrab and Rustum* is a translation/adaptation of a portion of the Iranian national epic that tells the tragic story of how a father kills his son in a three-day, single combat, the father fighting for the Persians and the son for the Tartars. From the grisly scene of death by the side of the river Oxus at the end of the poem, the poet takes us away in the final lines of poem:

> But the majestic river floated on,
>
> Out of the mist and hum of that low land,
>
> Into the frosty starlight, and there moved,
>
> Rejoicing, through the hush'd Chorasmian waste,
>
> Under the solitary moon;---he flow'd
>
> Right for the polar star, past Orgunjè,

Brimming, and bright, and large; then sands begin
To hem his watery march, and dam his streams,
And split his currents; that for many a league
The shorn and parcell'd Oxus strains along
Through beds of sand and matted rushy isles---
Oxus, forgetting the bright speed he had
In his high mountain-cradle in Pamere,
A foil'd circuitous wanderer---till at last
The long'd-for dash of waves is heard, and wide
His luminous home of waters opens, bright
And tranquil, from whose floor the new-bathed stars
Emerge, and shine upon the Aral Sea.

It's the river with which we are concerned. Today called the Amu Darya, it rises in the mountains of northern Afghanistan ("his high mountain-cradle in Pamere"); it flows in a generally northwesterly direction forming the border between Uzbekistan and Turkmenistan, turning to due north into the Karakalpakstan Autonomous Republic of Uzbekistan, whence it spreads out into a large delta ("through beds of sand and matted rushy isles") and, finally, empties into the Aral Sea. The problem is that when the Amu Darya reaches the delta today, it is not—as it was in the time of Sohrab and Rustum and in the time of Matthew Arnold, and as it was even fifty years ago—"brimming and bright and large." Rather, it is part of an ecological disaster, perhaps the worst on the planet.

Diversion of the water the Amu Darya for ill-conceived Soviet-era irrigation and industrial projects, has reduced the flow of its water into the Aral Sea by 90% in the past 45 years. As a result, not only has the delta dried up, but so has the Aral Sea. Once the fourth largest inland sea in the world, it has lost 60% of its water volume and 40% of its area. In its place have appeared sand bars that are deadly because they contain the runoff of toxic chemicals used in industry and agriculture. What water is left has become heavily saline and can no longer support the aquatic life that once gave the people that lived around the sea their livelihood.[1]

That much is fact. What follows is fiction, and I urge you not to fight the "facts" of the fiction. Like the economists in the story, I ask you to assume that under the right legal and social conditions their proposed solution to the problem would work (i.e., that the ecology would right itself). I am also asking you to assume that the cultural forces that are working against their solution are as they are described. (I know nothing about the customary law of the Karakalpakstan Autonomous Republic; my description of the customs is drawn from similar ecological situation in medieval England. I know very little about Islamic law and Soviet Socialist law; please assume that they are as described even if you know better.)

The Uzbeks and the Turkmens do not get along particularly well, but they recognized that they had a problem that required a joint solution. The area worst affected is inhabited by Karakalpaks, Turkmens, Uzbeks and Kazaks, all of whom speak Turkic languages and most of

[1] Facts courtesy of the *Encyclopaedia Britannica*, article on "Uzbekistan."

whom are Moslems, so they have some things in common. The governments of both countries jointly agreed to hire a group of Western consultants and agreed to abide by their recommendations. The consulting group consisted of a group of environmental scientists who knew their stuff and economists who knew *their* stuff. It also had a couple of lawyers, who did not.

The recommendation were relatively simple. The economists estimated that the water was more valuable in the delta than it was watering Soviet-style agriculture and Soviet-style industry along the way. The delta could be home to a lively fishing industry; it also could produce high-quality reed that could used for thatching roofs and caning chairs. If water could be brought back into the delta, it would begin to refill the Aral Sea. The saline content would come down; the fish would return, and the toxic chemicals would be buried in the sea bed rather than being exposed on sand bars. This would, in turn, make the water of the Amu Darya even more valuable at the mouth of the river rather than along it. The trick, as they saw it, is how to get the process going, and for this they proposed a market.

Hydrologists estimated with reasonable accuracy how much water would flow into the delta if it were not diverted along the way (roughly ten times what is now flowing). The economists proposed an auction in which water rights will be sold off to the highest bidders. The proceeds of the auction would be used to enforce the system against cheaters (folks who take the water when they don't have a right to it, or take more than they have a right to take). They anticipated that some of the industry and agriculture along the way will be able to outbid some of the delta uses, but that the result of the auction would be substantially to increase the flow of water into the delta. That, in turn, would increase the wealth of the delta and would permit those living in the delta to buy more water rights at an open market in such rights that would be maintained by the two governments.

The lawyers were then asked to devise a legal system to facilitate this scheme. The lawyers recommended that the Anglo-American common law be adopted, except for the common law of water rights. The newly-created water right would be treated as a profit à prendre. The usual collection of statutes would be passed to implement the system (Quia Emptores, De Donis, the Statute of Uses, a Statute of Wills, a Statute of Descent and Distributions [basically, the Uniform Probate Code's intestacy provisions], a Statute of Frauds, a Married Women's Property Act, a Race-Notice Recording Act, and a ten-year Statute of Limitations on Real Actions), plus a constitutional amendment that combined the fifth and fourteenth amendments to the United States Constitution.

All of this was done, and the first auction was held. Much to surprise of some people, it seemed to work, at first. Delta-dwellers were able to buy water rights. Some of the more egregiously inefficient users of water upstream were not able to buy them. They went out of business, and more water began to flow into the delta. Some fishing and reed-production returned and some related light industry. Enforcement was a bit of a problem, but there has not been wide-scale cheating.

That was fifteen years ago. It is now 2019, and the problem is that the market mechanism that the economists established is not working. The delta has improved, but the sea is still a disaster. The government-supervised market in water rights is still open, but not many water rights are

available for sale. Economic estimates still posit that there is more value in water in the delta than there is along the way, but the entrepreneurs who want to buy the water can't find it.

The Uzbeks and the Turkmens think that the problem may lie in the legal system that was created, and they have returned with three general problems which they say are typical of those that have arisen under the system and on which they need advice. How would the Anglo-American law of property, which they have adopted but about which they don't know much, deal with these problems? Further, and finally, what should they do to improve the system? This time they have consulted with Harvard lawyers who know something about property. You have been asked to write a preliminary memo responding to their questions.

(1) Prior to the Soviet era there was an elaborate system of customary law and practice in the delta region of Karakalpakstan. Memory of this system was not lost, and when the water rights were auctioned a number of traditional "big men" bought some of them. They had a pretty good sense where the water would return first, and they purchased the land that was likely to be the most productive in fish and reeds. They then proceeded to parcel some of this land out to tenants in turn for labor services. For the most part, however, the tenants work this land (and water) in common, essentially as share-croppers. A customary court, run by a customary lawyer working for the owner resolves disputes among the tenants and sees to it that the tenants do not cheat the owner or each other. The tenants, in turn, see to it, by force if necessary, that outsiders do not get any of the produce of the land or the water. As a matter of Anglo-American common law, the tenants are tenants at will, and the arrangements with them so far as working the common areas is concerned are, at best, employment contracts, but the existence of the customary court (totally unauthorized so far as the formal law is concerned) makes both the owners and the tenants feel that they have an elaborate system of mutual rights and duties with respect to the land and the use of the water.

The owners, in the meantime, have no incentive to trade water rights with each other, because they have little control over where the water goes. There has been some trading, but not much. The owners also fear that if they give up their water rights, someone will sell them back upstream, and they will all lose as a result. Outsiders (or locals who missed out on the first auction) might be willing to buy water rights from upstream owners, but they, too, have little way to control where the water goes once it gets into the delta. (They are also being stymied by the problems listed below as (2) and (3).)

The economists are concerned not only about the lack of incentives for the trading of water rights within the delta and the purchasing of them from outside, but also that the whole system of working the islands and rivers in common is not as efficient as more modern methods of farming and fishing might be. Both governments are surprised at what happened, wonder if it is legal, and wonder if there is anything that they can do about it. They are particularly concerned that some of the customary arrangements that have been in effect for fifteen years may have ripened into prescriptive rights.

(2) As mentioned above, most of the residents of this area are Moslems. Many of them follow Islamic law in their private lives; some were hoping that it would be adopted as the law of the two countries, at least so far as matters of family law and inheritance are concerned. The adoption of the Anglo-American law of property came as something of shock. A number of religious leaders advised purchasers of water rights to convey them to their lawyers who in turn

conveyed them back to the purchasers with the following language "to A and his heirs according to Islamic law." The Islamic system of inheritance is complicated. It differs from the Anglo-American in a number of important respects, the most important of which for our purposes are that property is divided, frequently among a large number of heirs; wills are, by and large, not used, and women, again by and large, receive half of what men of the same inheritance class receive. Some well-advised holders of these rights have also been making wills pursuant to the statute. These wills have almost uniformly given the rights to those who would have received them had Islamic law been in effect. A number have also given these rights, or a portion of them, to a *waqf*, a device similar to our charitable trust. Within a relatively short time, the number of individual holders of each of these rights has greatly increased. Those rights held by a *waqf* are, for all practicable purposes, inalienable. The managers of a *waqf* believe that the property is dedicated to the charitable or religious purpose for which it was given. Those water rights held by multiple heirs are difficult to alienate, because all the heirs have to agree.

Again, both governments need to know if these arrangements are legal, and to the extent that they are if there is anything that they can do about the problems that they are causing.

(3) The departure of the Soviets from this region in 1991 did not result in the departure of all who believed in a socialist economic system. Some of the Soviet-era collective farms and Soviet-era industries survived. Nor did the auction of the water rights put all of these enterprises out of business. Some of the managers of these enterprises (too many from the point of view of the economists) succeeded in buying water rights, which they then conveyed to the entities that they managed. The governance structure of these organizations varies, but most of them are dominated by the management with some participation by the workers. Many of the conveyances contain a condition that the water right not be sold. Others were worded in this form "to the XYZ collective farm so long as the water right is used for purposes of the farm." Still others contain convenants by enterprise, which are said to "run with the land" owned by the enterprise, that the water right will be used only to benefit that land. Even when the conveyance does not contain such provisions, the likelihood that the water right will be sold was substantially reduced once it became the property of the enterprise because these enterprises are operated not in the interests of making a profit but in the interests of the managers, and, to a lesser extent, the workers.

Once more the governments wonder if these arrangements are legal, and what they can do about them if they are.

Write the memo. (But before you do, *think*. There are lots of issues here; some of which your clients have identified and some of which are fairly obvious on the surface, but there's a more fundamental problem with the way that this arrangement was set up in the first place, and the problem is broader than just the cultural expectations of the people. One way to think about this is to ask the question whether this arrangement would work in U.S. if it were faced with a similar ecological problem. Once you've identified that problem, the question is what can the govenrments do about it now.)

30 January, 2004

MEMORANDUM

TO: Property Section 3B

RE: The Exam

I thought that the exams were good. No one failed. No one came even close to failing. There were a few dismal performances on individual parts. But those that did badly on one part compensated for it by what they did on other parts.

If you want to see your exams, they are in my assistant's office (Sady Cohen, Hauser 518). You'll have to show her your ID card, since they are arranged by ID number. If you want to see me about the exam, sign up for my Monday office hours. (If a lot of people want to do this, I'll schedule some extra hours.) There's a sign-up outside my office door, and please bring your exam with you when you come. Since the three middle grades (B, B+, and A-) into which the bulk of the class falls are "curved," I will probably not be able to tell you very much about why you fell on one or the other side of the line represented by those grades. (I know that many of you will find a "B" disappointing and an "A-" quite satisfactory, but my colleagues insist on three categories, and I don't know of any way to create them other than statistically.) I do think I might be able to help if you got a grade of B- or below.

There's relatively little that one can say about the objective and short-answer parts other than that as a group you did as well as classes taking the exam in the spring have done on the same or similar questions. Indeed for the first time in many years, someone got a perfect score on the objectives. (I made some changes in the objectives this year and in the process I introduced some unintentional ambiguities in a couple of questions. I solved this problem by scoring more than one answer as correct on those questions.)

Murphy's law of exams was in full operation this year. The last of the short answer questions was on the back page of the exam booklet, and a number of people apparently didn't see it and left it blank. I solved that problem by giving such people the average number of points that they had gotten on the first seven questions.

The essay question was somewhat different from the ones that I have given on recent exams in that policy issues were much more to the fore and the more technical legal issues were not interrelated. I had more fun reading the answers than I usually do. Even after seventy-five exams, people were still taking new approaches to the problem, approaches that were not only "interesting" but even quite possibly correct.

Hence, this exam is even less amenable to the "sample answer" approach and listing all of the things for which I gave credit would make this memo unconscionably long. The "sample" that I enclose is one that I wrote in less than an hour. It's a lot shorter than some of your answers were, and on some of the issues there was clearly a lot more that could be said. In my usually

objective fashion, I think I would give my answer an “A”; I doubt I would give it an “A+”.

I am less convinced than some of you were that massive regulation of the upstream enterprises by way of zoning is a solution to the problem posed. Of course, we want to impose some environmental regulation on the use of chemicals and pesticides, but simply zoning them out of business (something that a number of you saw could be done constitutionally with the use of amortization provisions) is a pretty blunt instrument to use to deal with what is a quite tricky problem. Without putting too fine a point on it, it’s like returning to Soviet-style planning, only with a different plan. Soviet-style planning didn’t work when it unduly favored the upstream uses. It may not work when it unduly favors the downstream users. What we need is an instrument that reflects the relative values of the upstream uses and the downstream uses. Right now we’re quite convinced that there ought to be more of the latter and less of the former, but if the system works we’re going to get to the point where a given upstream user is producing more value than the next downstream user that we could add. Markets are pretty good mechanisms for getting balances like this right, so I’m inclined to view the problem from the point of view of whether we can get a market mechanism to work and not whether we should bypass the market entirely.

This does not mean that some regulation couldn’t help the situation. Overall limitations on the amount of water that can be taken from the river upstream might work, though they would be difficult to enforce. The problem is not only preventing cheating but also with water rights parcelled out the way they are, the question is which upstream users have to curtail their uses if the overall amount of water being taken out of the river upstream is determined to be too much. Proportionate reduction would not be easy to administer.

This lead some of you to suggest that we should start off all over again. The governments could condemn all existing water rights (paying for them, of course) and reallocate them in a more sensible scheme. This would cost a lot of money, which is in short supply in the countries in question.

I was a little surprised at how many of you had been turned into believers in natural law. The issue arose because a number of you wanted to argue that the initial auction of the water rights involved, or might involve, a taking from those who had previously had those rights. There was no suggestion that such rights existed in the Soviet scheme of things, and the problem specifically said that the adoption of Anglo-American property law did not include the adoption of Anglo-American water law (about which I assumed that you knew nothing, although some did know something). Undaunted by any indication that there were any such rights in the positive law, a number of you turned to natural law and argued that such rights arose by the labor of those who had diverted the water upstream or who had extended their wills towards it. It was an interesting argument and worth some credit, though I must confess that I find it highly unlikely that any Anglo-American court (or court in Central Asia applying Anglo-American law) would buy it.

As is always the case with such exams, some people did better on the details (the problems that have arisen under the current scheme on which you were asked for specific solutions) than others. There were a few common mistakes, which in some cases were not so much mistakes as they were fairly obvious roads not taken.

(1) The tenant (mostly) share-croppers and the “big men” who are operating under an unofficial customary legal system sent many of you in the direction of prescription (a problem that had been flagged for you), but many of you went there too quickly. I was hoping that more of you would see that pretty standard contract doctrine will, in the name of enforcing the will of the parties, look to the background understandings of the parties. What looks like a contract of employment at will may not be if that is not the common understanding. Similarly, what looks like a tenancy at will, if we import some contract doctrine, may not be a tenancy at will. Here we are told that the understanding of mutual rights and duties is sufficiently clear that an informal system of courts enforces them, apparently with everyone acquiescing.

(2) The married women’s property acts have nothing to do with spousal share statutes. There are, however, spousal share provisions under the Uniform Probate Code. Neither act would prevent someone from devising property his children and giving the daughters half of what the sons got. I think it highly unlikely that a court would apply *Shelly v. Kraemer* to this situation. Even in the presence of an equal rights amendment (which was not one of the “received” statutes or constitutional provisions), there are difficulties, principally with the concept of state action.

(3) The covenants that the managers of the Soviet-style enterprises have entered into with their enterprises and which are said to “run with the land” gave a few of you conceptual fits. The deal is clear enough. The holder of a profit in gross conveys to a land-owner (the enterprise) and extracts from the enterprise a promise that the profit will only be used to benefit the land. When the profit is a water right I think that promise pretty clearly means that the water must be used on the land. The effect (if it is effective) of this is to make it impossible to sell the profit without selling, leasing, or otherwise giving the profit-holder access to the land. Some of you questioned whether a covenant could be made to run with a profit in such a way as to bind future owners of the profit. You may have had a point, and my model answer does not treat this problem well. Upon further reflection, I am inclined to think that courts faced with such promissory language would hold that the effect of it is to make the profit appurtenant to the land. Now whether that might be deemed contrary to public policy granted the way the water rights scheme was set up is a good question. A few of you got to the same result by using the “touch and concern” requirement as a vehicle for making policy choices about the content of covenants.

"MODEL" ANSWER

1. Customary arrangements in the delta.

We're told that the tenants of the "big men" are, as a matter of Anglo-American common law, tenants at will and that the arrangements that they have with the "big men" and each other are, at best, employment contracts. What is happening certainly doesn't look like tenancies at will, and the way the people are behaving gives a considerable amount of content to these "employment contracts." So long as the parties operate within the extra-legal customary system, there is little that the formal courts can do. (One is reminded of all sorts of industries that operate largely outside the bounds of formal law making use of arbitration panels.) Eventually, however, someone will break out of the system and appeal a result in the customary courts (or an action of one or more of the "big men") to the formal courts that have been established. How will these courts react?

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Anglo-American courts are quite used to looking to customary practices in a given industry or area to give contents to contracts that are otherwise quite vague. In this regard, one can certainly imagine that an Anglo-American court, faced with the problem of interpreting the (probably oral) employment contract entered into by the "big men" and their tenants would enforce, as a matter of contract, basically the same set of arrangements that are being enforced in the customary courts.

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Similarly, looking at the tenancies at will as basically contractual, one can certainly imagine that an Anglo-American court might well interpret them not as tenacies at will but as periodic tenancies or even life estates, subject to the condition that the tenant perform the services customarily required.

While these considerations probably should be of more concern to the governments than the one that they have named (that the customary arrangements have become prescriptive property rights), the latter possibility is not inconceivable. While the right to take the produce of the delta land (and probably the right to take the fish in the water that flows past the land) belongs to the "big men" as part of their ownership rights in the land, they have for the last fifteen years allowed tenants to take a part of this produce as, it would seem, a matter of right. The key issue here is whether their action could be regarded as "permissive," and it is difficult to predict how a court would come out on that question. Suffice it to say that law of prescriptive easements and the closely related areas of irrevocable licenses, easements by estoppel, and partial performance of oral licenses might lead a court to hold that the tenants had acquired property rights to take a portion of the produce under quite tightly controlled conditions (those established by the customary court).

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All of this is rather bad news for the governments who were hoping to see more efficient methods of exploiting the delta's resources emerge. It is not clear that anyone in the delta knows about those more efficient methods and perhaps the first step might be to establish one or more "model farms" to show how it could be done. Once the "big men" see how they could make more money with other methods, they might be encouraged to try them. At that point the legal doctrines described above could stand in the way. If the more efficient methods were really that much more efficient it might be worth the while of the "big men" to buy out their tenants in order to convert to the more efficient methods, but it will take a long time. In the meantime,

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the law could be tweaked to make it easier to exclude the tenants, but not without a considerable loss of expectation value.

2. Islamic law by private agreement

5 “To A and his heirs according to Islamic law” is the same thing as saying “to A and his heirs” Anglo-American common law does not allow the establishment of new forms of inheritance.

5 A properly drafted will that gives the property to those who would have been the heirs under Islamic law is perfectly valid, but those who take the property are under no obligation to continue the system. The problem suggests however that those who have received the property are inclined to continue the arrangement, and there is nothing illegal about their doing so for generations. Such wills could be made illegal, but perhaps a less blunt instrument would suffice. The common law allowed profits to be divided but required that multiple owners exercise their profit “as one stock.” It would not be a radical move to amend the water-right statute to require that water rights could not be divided if the result was to create a right less than a certain number of acre-feet. Unlike the collective enterprises in problem (3), there is nothing about those who are holding these rights under an imagined Islamic law which discourages them from selling to more downstream owners.

5 The waaqf will probably be treated as a charitable trust under Anglo-American law. This means that whatever the trustees may think, they do have the power to convey the property in the trust. Indeed, they have an obligation to do so if it would better serve the purposes of the trust. One could contemplate a huge public enforcement effort on behalf of the beneficiaries of the trust to get the trustees to sell, but perhaps a less blunt instrument would suffice. The law could be amended to make it clear that long-term leases of the water rights are permissible. If the terms of the lease were long enough, the entrepreneurs whom we are told are willing to buy water rights for use in the delta could acquire the rights with the reversion remaining in the waaqf and the proceeds, of course, dedicated to charitable purposes.

3. Former Soviet enterprises

5 A restraint on alienation of a profit is, unfortunately, not automatically illegal under the rule against direct restraints on alienation. That rule, by its terms, only applies to freehold possessory interests. One can certainly imagine a court voiding such a condition in a sale on public policy grounds, and the law might be amended to require that result.

5 A determinable grant of a profit is not only not invalid, it may even be encouraged in this situation. In the case of easements we have a strong preference for appurtenance. While there is no such general preference in the case of profits, one can certainly see how absent the special considerations of this case how a court, as a general matter, would favor making a profit appurtenant. Again, an amendment of the statute could reverse any such policy inclinations, but more radical steps would be required to prevent people making them appurtenant by private agreement.

Similarly, assuming that the technical requirements of running covenants have been met, there is no legal objection to a covenant being attached to the grant of a profit requiring that the profit be used to benefit a particular piece of land. The benefit of the covenant is technically in gross; that is

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of concern in only a minority of jurisdictions. The question then becomes whether one would want to a revive a doctrine that could be used to strike down these covenants when as a general matter one would not want to revive the doctrine. Again, a specific amendment of the statute applying only to the statutory water rights might help here.

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The fundamental problem here, of course, is the way that the collective enterprises are organized and managed. That's a problem in the law of business associations, and I'm not going to take that course until next semester.

4. The Basic Problem

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The basic problem is that the designers of the system did not think long enough about the incentives that private property rights would and would not create when the water resource was privatized. We assume, to start off with, that the auctioning of the water rights was effective to create private rights in the nature of a profit a prendre in the water itself. Although there are plenty of examples within the Anglo-American tradition (the U.S. government's sale of large amounts of government-owned land in the west in the 19th century, the auctioning off of pieces of the spectrum for use in radio and television broadcasts), creation of these rights in our problem happened at the same time as the adoption of the Anglo-American legal system and to the extent that they are inconsistent with it (and it's not at all clear that they are; see the prior appropriation system for water rights in the U.S. west), they can be regarded as an exception to the system. Hence, any discussion of how the water would be treated under Anglo-American law had there not been a special action by the sovereigns with regard to them is beside the point. [Jettison here any discussion of the public trust or wild animals.]

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The statement of the problem is bit vague as to just how these profits work, but it says enough that we can get a pretty good idea. The hydrologists had an estimate of how much water there is in the river at any given time. (This will, of course, fluctuate with the weather; we must assume that they took the lower end of the estimates.) The auction was established to sell profits in the water. How would that work? We assume that what was sold was a non-possessory interest (water is hard to possess and no one possessed it when the sale was made), a right to take a certain quantity of water over a certain period of time (x acre-feet per day, per month, per year). The right, we must assume, was not appurtenant; it could be used by anyone who held it who could get to the river. (This last condition means that in order to exploit the right, the holder had to have access to the river. What the "big men" in the delta did and what the managers of the Soviet-style enterprises did suggests that they realized this. It is less clear in the case of the Islamicizers.)

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So far so good. The problem arises from the fact that a right to take a certain amount of water in a certain time period is just what the upstream enterprises needed. They are using the water to water their farms or cool the turbines of their engines or whatever. Some of this water makes it back into the river where it can be used again (assuming that it is not too polluted for the purposes of the user), but not nearly enough for the purposes of the downstream users (principally those in the delta).

The users in the delta, on the other hand, are not individually benefited from having the water right. Fishing doesn't take any water; it takes

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something out of the water; the water justs “floats on.” Nor does the description of the reed farming suggest that it takes water. The reeds grow in the marshes and islands of the delta. The problem specifically says that the delta owners can’t control where the water goes. (Of course, that’s an exaggeration; one can certainly imagine systems that shipped water from one part of the delta to another, but the fact that no one is doing that suggests that doing it is not practical.) Hence, for the delta users the water is not a private good; it is a collective good. They all benefit from having the water there, but the benefit does not increase to the individual owners of water rights if they have more of them.

The initial auction in which the “big men” bought some water rights and the upstream owners lost some was an act of naivete by the “big men.” They acted collectively to do something that was not in any of their individual interests. No one said, “I’m just going to buy some land that will benefit from increased water, and let my neighbor Ali bid in at the auction. He’ll pay the money and we both will get the benefit.” Now they have gotten smarter. No one is buying water rights because everyone now realizes that increased water in the delta will benefit everyone not just the purchaser of the rights. “Let Ali do it.” Indeed, the only thing that is preventing the resale of the water rights back upstream is a collective fear that if this is done they will all lose out. This is a dangerous situation. It will not be long before one of the “big men” realizes that he could probably gain a lot more than he would lose if he sold his rights upstream.

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In order to make this market work, we need as a minimum a mechanism to pool the buying power of the delta owners. Whether this is done by governmental action (a delta regional authority is established with power [and money raised by taxes on the delta water-users] to buy water rights for the benefit of the entire delta) or by private action encouraged by the government (enabling legislation is passed allowing the delta residents to establish some form of cooperative) is a detail that can be worked out later. How much government interference with existing rights is necessary is a complicated question. We have already suggested that a considerable amount of “tweaking” of the existing rights scheme is necessary to discourage the fractionalization that greatly increases transactions costs. At the other end of the spectrum of possibilities is condemnation of all existing water rights and reallocation. This would be costly if the compensation requirements of the US constitution were followed, costly not only because of the compensation payments that would have to paid but costly also in transactions costs.

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If what we have suggested above is correct, however, there is one more change in the scheme that probably has to be made. The temptation that the delta holders of water rights have to sell out their neighbors for their own short-term advantage is too great. The content of the water right should be changed so that once it was sold downstream it could not be sold back upstream. This would, of course, require that the right be made appurtenant to some extent and would, of course, interfere with market operations. It seems, however, to be necessary, and it probably could be accomplished making use of the regulatory rather than the condemnation power of the governments. (Once the water rights in the delta are collectivized this provision could be eliminated. There may be some instances in which the water is worth more to a given upstream user than it is to the downstream users.)

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