27 January 2009

MEMORANDUM

TO: Property 2

RE: The Exam

The essay question was hard. There were a lot of possibly relevant facts and issues, and cutting to the quick was not easy. Having written the question, I normally have no trouble writing my own answer in a couple of hours. This time it took me all of a long afternoon. That said, I have the impression that many of you did not follow my advice and spend quite a bit of time just thinking about it. I read a lot of answers that seemed to proceed along the following lines: "This case raises an issue about X, let me tell the professor what I know about X." This was particularly true on the part of the question that asked for a constitutional judgment. While it didn't work out this way in every case, it was striking how many of the really good exams (the ones that ended up getting an H) were also the shortest. The harder the problem, the longer you have to think about where the nub (or, in this case, the nubs) of it may lie.

The end results were, however, for the most part and considering the difficulty of the question, quite good. Most of the exams that were full of irrelevancies or with things that were only marginally relevant also managed to say things that were right on point. In the real world, it would be a rare situation in which you had only seven hours to come up with an answer to a question as complicated as this one, and we all have different styles of working. Some people prefer to write only when they are pretty sure that they've found the core; some people like to put everything down in a kind of stream of consciousness and then edit to find the core. It was just that many of those who took the second approach ended up by not having enough time to edit.

In a question as long as this one, I did not expect everybody to devote the same amount of effort and space to each of the core issues. I did this deliberately. It allows you to focus on things that you find intriguing, and it makes for more interesting exams to read. Some people spent a lot of effort on the problem of the title to the land; some dealt with that problem relatively cursorily but spent a lot of effort on the statute of limitations as applied to personal property. In theory, and in fact, such people could do equally well. Almost everyone found something on which they could shine.

Having said that on the whole you did quite well on what turned out to be a very difficult question, let me suggest a couple areas where many, perhaps most, of you did not do so well. You have a client, O. Obviously, your job is to argue the case for him. Many people did not do this. This does not mean, of course, that one shouldn't recognize arguments that go against him, but when you do, you should try to think of counter-arguments. For example, if the court is inclined to adopt a discovery rule with regard to the statute of limitations on personal property, it will probably phrase it in terms like "when the owner discovered or could with reasonable efforts have discovered that the good was stolen and who now has it." This raises obvious problems for O, who sat on his duff from 1999, when the stone went missing, to 2005 when he saw it on television. We need something to counter this undeniable fact. The move that I made in the answer was to focus on how difficult it would have been for O to discover where the stone was granted how quickly it went underground, on the fact that the Parisian dealer seems to have been operating on the margins of the rather murky world of dealers in antiquities, and on the fact that V may not be as innocent as he

appears to be at first glance. Others asked whether it would be reasonable to expect a Minnekota farmer to do anything more than O did (implying that the standard might be a lot higher for the Guggenheim Museum). The point, however, is to come up with the best arguments that we can muster to support O's claim.

Far too many people thought that Minnekota's race-notice recording statute would protect O if he recorded his deed from the town. That's wrong for two reasons: since Anders's probated will is on record, O has notice of the possibility that there are outstanding interests. But it's wrong for an even more fundamental reason. The recording statute protects the vendee who purchases land from the same vendor who previously sold the land by an unrecorded deed. The town of Bensington may have done a lot of things that were wrong, but it didn't sell the poplar grove twice, nor did anyone else involved in the story.

I was also, in general, disappointed with the results on the final part of the question: what would happen if the state amended its antiquities statute to eliminate the distinction that it draws between public and private land. Far too many of you assumed that that would mean that the archaeological survey folks could simply walk on to private land and start excavating. They can't even do that with state-owned lands. The agency that has responsibility for the land can stop it. Some people even assumed that the state could prevent the sale of private land that contained archaeological sites. But the problem specifically says that that is not being proposed. What the change in the statute would do is give the state the exclusive right (privilege) to conduct archaeological digs. Hence, it would deprive the landowner of his privilege either to dig himself or to authorize others to do it. This is a control of a type of land use, not a potential trespassory invasion of the owner's land. The change in the statute would also vest title in antiquities in the state. Both changes raise constitutional issues, but they are nothing like as open-and-shut as the possibilities that many of you considered.

The "model answer" that I offer below contains in diamond brackets arguments that you came up with and I did not think of when I wrote my answer and a few arguments (also in diamond brackets) that some people thought of when they probably should not have. The "model answer" is on the long side even without the insertions in diamond brackets, but that is because I wanted to exclude arguments that I thought that some of you might make, even if I regarded them as quite implausible.

Our new grading system puts even more pressure than did the old one the distinction between Honors and Pass (formerly A-/B+), and it's no more easy to draw it than it was previously. When the grades are out, I'm perfectly willing to talk to you about how you did, but I'm unlikely to satisfy you about why you fell on one side of that line or the other, particularly if you were close to the line.

Charles Donahue, Jr.
Paul A. Freund
Professor of Law
(617)495-2944

CD's Answer

Time line:

1910--death of A
1930--death of B
1961--Olaf's father acquires 1/3 of Farm4
1991--Frans dies
1995--Olaf buys poplar grove from town
1998--discovery of the stone
1999--stone identified tentatively and disappears
2000--Verner buys stone from Paris dealer
2005--Olaf finds out about stone from a television show
Jan. 2007--notification

While I was asked to begin with the question who owned the stone before Olaf found it, it turns out that that question is intimately related to the question who owned the land. The issues, however, that that question presents are quite separate from the issues of the ownership of the stone. Hence, I begin with the ownership of the land and then proceed to the stone.

Ownership of the Land

Title Under Anders's Will

A owned the land in 1910. That much seems clear. He died testate, and his will provided:

"I devise and bequeath to my first-born son Borg the farm [adequately described] for his life, with a remainder to his first-born son for his life, with remainder to his first-born son for his life, with remainder to his first-born son for his life, with remainder in fee to his first-born son when he reaches the age of 25. If any of the life-tenants mentioned does not have a son living at the time that the son is to take the property, I devise the property to the life-tenant's first-born daughter for life, with remainders to follow as above. If any of the life-tenants mentioned has neither a son nor a daughter living at the time he or she is to take the property, I devise the property to my residuary legatees or if they be dead, to their issue." The residuary legatees were Anders's only children Borg, Erika, and Davin.

If we take the will at its face value, the life estate in Borg is good under the RAP (Borg is a life in being at the effective date of the instrument), and the life estate in his first-born son is good. He will be identified no later than the death of a life in being (B). None of the other life estates is good, because they are dependent on who is a child of someone who is not a life in being at the effective date of the instrument, and, of course, the remainder in fee is void. <A few people played around with the age contingency in the final remainder in fee; that's rearranging the deck chairs on the Titanic.> The alternative remainders in the first-born daughters are somewhat different. They have the same perpetuities problem as do the first-born sons, but they have an additional problem: whether or not they take are dependent on whether a first-born son survives to the death of his parent. Hence, as the will is written, the only remainder in the daughters that is valid under the Rule is the remainder in the first-born daughter of Borg. Similarly the second alternative (neither a first-born son nor a first-born daughter survives) is valid only for the life estate of Borg.

In fact, however, as opposed to as written, a bit more survives the perpetuities analysis. At the effective date of the instrument, Borg did have a first-born son, Frans. (He was 82 when he died in 1991, so he must have been born in 1909,

before his grandfather died [1910].) That means that the remainder in his potential first-born son and first-born daughter is good under the Rule. We don't know whether he ever had either a son or a daughter, but we do know that he died childless. Under the will, the property is therefore to go to the residuary legatees, and if they are not alive, to their issue. The issue are, of course, not lives in being at the effective date of the instrument, but they are to be identified at the time of the death of a life in being, Frans.

<Some of you who did not see that F was a life in being also thought that a court would give him a fee simple absolute. Almost anything in possible as courts attempt to remake wills that violate the RAP, but it's very rare to expand a life estate into a fee. A couple of you applied (whether or not you called it that) the doctrine of "infectious invalidity," voiding the entire devise and giving the property to the residuary legatees. Once more, that's possible, but pretty remote. Normally, infectious invalidity is applied only if valid interests make no sense in terms of what the testator's scheme seems to be. This scheme is odd, but we can save some of it, and I'm inclined to think that that's what a court would do.

The approach to the problem that I take above is, I think, the one most likely under a modern common-law analysis. It assumes, for example, that "first-born" is to be taken literally, i.e., it means the first-born, not the eldest who survives. (This leaves, of course, a gaping hole in the dispositive scheme: what happens if the first-born doesn't survive but another son (or daughter) does? Fortunately, that didn't happen, because malpractice suits generally do not survive the death of the malpractitioner.) It also splits up the alternatives upon the death of the life tenant, so that the alternative interest in the issue of B, D, and E is valid, when it follows F's life estate (because he was a life in being at the time of Anders's death), even though the same interest would not have been valid at the end of the life of estate of F's first-born son if he had had one. It also looks to the facts as they actually existed at the time of A's death, but that is a "saving" technique that is quite common in common-law perpetuity analysis.>

The rest of the will need not concern us. It's a total mess. It is, however, perhaps relevant, that invalidating later interests under the RAP would probably lead to an implied reversion that would go to approximately the same people with one rather important exception: At the time of Frans's death, he had no issue; hence, we need not be concerned about who his heirs at law were. One child of Borg did survive Frans's death, Nissa, and she counts as "issue" of Borg. She left her entire estate to her second husband, Jakob. (Her first husband we not be concerned about, unless, in an unlikely event, the divorce settlement included some mention of future interests of Nissa's.)

<This assumes that "issue" will be interpreted as meaning lineal descendants (probably on a *per stirpes* basis). It's not always interpreted this way, but it's the most common interpretation and the one that seems to correspond with what the testator probably had in mind in this case. It also assumes that when the devise says "to [B, D, and E], or if they be dead, to their issue" that means to the issue who survive to the point at which they should take. [This was bad drafting on my part. I should have said "or if one or more of them is dead, to such issue of B, D, and E who survive to that time." Good drafting would also have included a definition of "issue." But even without that language, there's no doubt that a court should close the class as of the death of Frans; otherwise we have a perpetuities violation.] Although alternative interpretations are possible, they are so convoluted and counter-intuitive, that we probably shouldn't worry about them. Another way to get to the same result (excluding the heirs or devisees of F) is estoppel by deed. After all, he did purport to convey a fee to the ancestors of O, P, and R. It is also possible that the same doctrine would bar Jakob, since Nissa signed the deed. But, as a couple of you pointed out, we don't need to be that fancy. The deed itself probably sufficed

to convey to O, P, and R the future interest that F and N had. We still need an argument, however, like the one below about correcting the deed, to get the poplar grove into the conveyance.>

There are, however, "numerous descendants," i.e., issue, of Anders's other residuary legatees (D and E) living in Minnekota<, and, as we have already, seen, it looks as if Jackob has a claim too. In all probability, however, we can get rid of that claim by focusing on the fact that Nissa signed a deed in 1961 purporting to convey a fee in the land.> From our point of view, this is not good news. Not only is title to the poplar grove potentially in someone other than our client, but it looks as if there are a lot of potential claimants. Is there any way in which we can avoid this situation, or, at least, make the claim of J and D and E's descendants less plausible?

<Some of you suggested, either implicitly or explicitly, that it really made no difference whether the alternative interest in the issue of B, D, and E was good or not, because if it is not, there will be a reversion in the devisor that will pass by the terms of his will to B, D, and E. I'm inclined to think that it does make a difference. Not only does validating the alternative interest allow us to exclude the heirs of Frans and, probably, Nissa (something that we could probably also do if the interest were a reversion), but it saves us having to go back to 1910 and trace what happened to the estates of D and E. Those who tried to do it discovered that all kinds of folks might come out the woodwork, spouses, devisees, perhaps even creditors. It's a lot easier to figure out who the issue of D and E were in 1991 than it is to figure out what happened to their property over the course of almost 100 years.

Some of you saw the analogy between what Anders was trying to do and the common-law fee tail male. A couple of you argued, perhaps by analogy to what some states do with attempts to create fees tail, that B could be regarded as having a fee simple. That result would help O (and P and R), and I should have thought of it. Having thought of it, I think it unlikely that a court would go down that road. What Anders was trying to do (though heavens knows what he was really trying to do because his lawyer did such a bad job of expressing it) is sufficiently different from any of the common-law fees tail (male entails don't go to the first-born but to the eldest who survives; birth order makes no difference in female entails; shifting from male to female is not allowed, etc.) that I think it unlikely that a court would use this analogy.>

Title By Adverse Possession?

When the Johanson farm was sold in 1961, four people signed the deed. As we have seen only one of them, F, had a present interest, and that only to a life estate. This is not much to go on, and we don't have all the facts. It is certainly possible that F and N thought that they had a present interest in fee (and in common), which would have been the situation if Borg, who apparently died intestate and a widower, had himself had a fee interest in the land. The fact that K and I signed the deed provides some further support for this idea, because spouses have no interest in their spouses' life estates, but they have potential spousal rights in their spouses' present fees. Thinking that you have title, of course, is not enough. That fact, at a minimum, has to be communicated to the potential adverse claimants, in this case the descendants of D and E. Once more, we don't know enough of the facts, but it is certainly possible that everyone had forgotten about A's will, and that F and N's cousins knew that F and N were claiming a present fee interest in the land. They may well have been aware that they purported attempt to convey a present fee interest in the land, and a court might hold that they had an obligation to notify the fathers of O, P, and R of their outstanding claim if they intended to maintain it.

The case is not open and shut. The remainder in Nissa and the descendants of D and E did not fall in until 1991, and the statute of limitations will not run

out on their claim until 2011<, perhaps not until 2015>. Much might depend on facts that we haven't got, on whether over the long period of time since the death of Borg, the occupants of the property did things that would give rise to a cause of action in those who held the remainder (such as committing what would be waste for a life tenant) or, at least, put them on notice that they were claiming adversely.

If we can establish fee title in O, P, and R by adverse possession, we still have the problem that the poplar grove was not included in the 1961 deed. That was a mistake, and equity has the power to correct errors in deeds. Exactly how an equity court would divide the title to the grove among O, P, and R probably need not concern us, because the facts suggest that that portion of the land that contained the runestone would belong with O's property. The reason why he cut down the tree was to expand one of his fields, which lay "close by."

When O, P, and R asked a lawyer if they could establish title to the poplar grove by adverse possession, the lawyer advised them that they didn't have much of a chance. We don't know what went into the lawyer's thinking, but one of the elements that s/he probably thought was critical was the fact that none of them could claim possession of the whole grove to the exclusion of the other. If we reanalyze the problem, and ask whether O could be regarded as being in possession of the just that portion of the grove that contained the tree that got cut down, we might get to a different result. Our argument is that F and N clearly intended to transfer possession to him of this particular portion, and he took possession, at least as much possession as one can have of a poplar grove that one intends to leave "as is."

<An alternative possibility, which a couple of you saw, is that the O, P, and R established adverse possession as tenants in common. That's not as good an argument for O, but it might be better than nothing, because it cuts out Jakob and the multiple descendants of D and E.

One of you saw an interesting argument that the descendants of D and E, who are living in the area might be found guilty of laches even before the statute of limitations had run out against them (arguably, 2011, perhaps 2015, on these facts). When F died, they did nothing. One could go further. When O cut down the tree in 1998 and showed the stone to a whole bunch of folks, they did nothing. When the town took the land for back taxes, they did nothing. It's now 2009; where the hell have you folks been all these years?>

Hence, there is a pretty good argument that the interest of J and the descendants of D and E in the portion of the poplar grove that contained the tree had been extinguished by 1995. That means that the failure of the town to notify them of the tax sale is irrelevant. In fact, it belonged to O. O lost it momentarily for failure to pay back taxes, but then bought it back, so that he was owner either under the tax deed or by adverse possession in 1998, when he cut down the tree.

There is a possible additional argument against this. It would seem that O did not have the right (privilege) to cut down the tree. The timber rights on the Johanson farm were reserved to the residuary legatees. There is no indication that anyone did anything inconsistent with those rights during the long period between the time that they were reserved and the time when O cut down the tree. Hence, his doing so was a violation of those rights. It is possible that those rights were extinguished by the town's sale, but it would seem that such a sale would only be of those rights which the person who failed to pay the taxes had. Obviously, cutting down the tree is not the same thing as discovering the runestone. Olaf may owe the holders of the timber rights the value of the tree cut (probably minimal). Whether this affects his potential right in the runestone is best treated when we consider his claim to the stone.

<This analysis of the timber rights assumes that they are held in gross. A number of you suggested that they might be regarded as appurtenant to the land devised to B, D, and E. That's a bit odd, but it's possible. The notion, however, that B's rights would merge with his life estate is, I think, wrong. His timber right is inheritable; his life estate is not. I must confess that I did not see the possibility of appurtenance when I wrote the problem. There is generally no presumption of appurtenance in the case of profits as there is with easements.

A number of you thought that the timber rights might have been abandoned. While this is possible, it is unlikely. Although easements and profits may be abandoned (as possessory interests in land may not be), it is almost universally held that there must be some evidence of intent to abandon. Nonuser, even for a long period, is not enough. I can hear an argument that the departure of Borg's family for the west might be taken as abandonment of their share of the timber rights, but that still leaves the "numerous" descendants of D and E.

A couple of people thought that the timber right might not be inheritable ("heirs" not being mentioned). This is possible, though the same tendency to assume that a possessory interest is in fee unless it is specifically limited also applies, at least as a general matter, to easements and profits. As a general matter, the hostility, to the extent that still exists, to the transfer of easements in gross does not apply to profits in gross.

A number of you tried to argue that the profit in the timber was not exclusive, i.e., that the timber rights would be shared with anyone who owned the land, even if that person were not one of the holders of the timber rights. This is possible, but I think it unlikely. The reason that I think it unlikely is that the rights were created by way of reservation. Anders conveyed the land but reserved the timber rights. That's a pretty good indication that he intended that the timber rights not be included in the conveyance of the land.

A couple of you found out that there is a common-law rule that one cannot reserve easements in a deed in favor of third parties. There is such a common-law rule, but I think it highly unlikely that it would be applied in this situation, even if the court was inclined to follow it as a general matter (many courts do not). The rule is connected with a bizarre series of conceptions about what a reservation is and about the delivery of deeds. What we have here is a devise, an instrument that is not subject to the rules about the delivery of deeds (for obvious reasons), and the reservation would almost certainly not be interpreted as one in favor of third parties, but as one that reserved the profit in the testator which then passed by devise to B, D, and E.>

Ownership of the Stone

Finders Keepers

<How much of what follows you could have gotten from the material that I provided you, I'm not sure. I think that you could have gotten what's in the next paragraph.> The common law on finders of personal property is full of abstruse distinctions. Two things emerge with relative clarity: (1) Much of the law seems to be designed to ensure, to the extent possible, that the true owner of such property has a reasonable chance to reclaim it. The distinctions sometimes awkwardly drawn among lost, mislaid, and abandoned property seem to be based on that policy. If we apply those distinctions to this case, the category that comes closest to fitting is abandoned property, and here consideration of giving the best chance to the owner to reclaim the property is absent. (2) The separate category of treasure trove does not seem to apply here because treasure trove must be money, which the runestone is not.

As a general matter, the law about found objects, whether they are treasure trove or not, seems to vacillate among giving them to the owner of the land on which they are found, giving them to the finder, and giving them to the state or one of its agencies. Minnekota has no authority directly on point, but it does have an antiquities statute, and the runestone clearly fits the definition of "artifact" found in that statute. The statute clearly claims ownership for the state in archaeological artifacts found on state land. It also makes criminal the digging up or removing of artifacts from private land without first obtaining the permission of the owner. It would certainly be consistent with the statute for a court to hold that the owner of the land owns artifacts found on his or her land. It would be odd, if not a contradiction of the statute, for a court to hold that the state owns archaeological artifacts found on private land.

If it is determined that Olaf owned the land on which the runestone was found (a route that we can reach either by holding the tax sale valid or by holding that he acquired the land by adverse possession), then Olaf owned the runestone when he found it. He was both the owner of the land and the finder, and the statute seems to exclude state ownership. If it is determined that Olaf was not the owner of the land when he found the runestone, we then need to ask whether the statute says anything about this situation. Olaf certainly did not obtain the permission of the owner, but that is because, as seems quite clear, he did not know that he did not own the land. Certainly, the criminal penalties of the statute should not apply to him. The statute does not give us much guidance as to who as between the finder and owner of the land owns the artifacts if the finder is not trespassing when he finds the artifact. Perhaps the legislature assumed a background law that does not seem to exist, or perhaps the legislature assumed that that would be worked out between the owner of the land and potential finder when the latter obtained permission.

<A couple of you made an argument that the state owns the runestone because title to the grove was once in the state. The most sophisticated version of this argument was that the state still owned the land in 1998 if the notice of sale was invalid. I don't think that this argument stands much of a chance, though I can see how someone might make it. § 13-6-304 of the statute says that the Archaeological Survey has the power to reserve from the sale of state lands "including lands forfeited to the state for nonpayment of taxes" if the survey has found that there are, or may be, archaeological sites on those lands. Without getting into the question whether tax sales made because of failure to pay local taxes are sales of "land forfeited to the state," the simple answer to this argument is that the Survey didn't act before the sale. Assuming, however, that the sale was void for lack of proper notice, we do have to ask the question whether these lands are "state lands" within the meaning of § 13-6-301(a)(2), so that the objects (the runestone) are "property of the state." Foreclosure of a tax lien normally does not give title to the lienor. Even if it did, the title would be voidable if proper notice was not given. I think it unlikely that the state would end up with title to the runestone if, upon proper notice being given, the owner (whoever he, she, or they are) redeems the property.>

Normally, it makes sense to reward a finder with ownership of a found object if considerations regarding the original owner are not present. If the finder had not found the object, it might still be lost. <It also corresponds to our basic notion that property that has no owner belongs to the first occupant.> The possible policy objection to this holding, that it encourages trespassing, seems to be precluded by the statute's insistence that the potential finder first obtain permission of the owner. There is, however, a policy consideration here that is not present in the normal case of finding abandoned objects. Amateur searchers for antiquities are likely to harm, if not destroy, the archaeological value of the site. Minnekota clearly recognizes this problem in its discouraging of amateur archaeological digs. They urge, though they do not require, that discoveries of sites be reported to the state.

In the situation presented by this case--and there's no reason why a court could not limit its holding to the somewhat unusual facts of this case--it seems to make sense to reward the finder. Where the good-faith possessor of the land is also the finder, it would be strange indeed to give ownership of the object found to the true owner, who had shown no interest in the property for decades. Indeed, if possession of the object is in some sense derivative from possession of the land, O might even be thought to have had possession of it prior to its finding.

<While I am inclined to think that this is the way an American court would approach the problem (beginning with the statute and filling in where the statute failed it), it is certainly possible that it would approach the problem, as some of you suggested, from the point of view that the statute is irrelevant and the common-law authorities a mess, so we have to go back to first principles. Although a court would not say this in so many words, it would be quite appropriate here to say that neither the protection of O's expectations (à la Bentham) or treating his will as a categorical imperative (à la Hegel) is particularly powerful here. O didn't expect to find the stone, and his behavior after he did find it fits a bit uneasily with the notion that he extended his will toward it and made it part of himself. One might even say that from this point of view, it looks as if V has a lot more invested in the stone than O. None of these arguments looks very good for our client, so we should emphasize what he did do. He took a picture of it; he lugged a 200 lb. stone to his woodshed, and he showed it to various people, including Thorkild. When he saw it on television, he took a trip to the state university, and it looks as if this was before he knew how much the stone was worth. This is probably enough to back up the basic argument that we made above if someone should raise the theoretical objection.

A few of you, too many in my view, thought that the absence of a finder's statute in Minnekota would preclude a court's holding for the finder on common-law grounds. That idea is belied by the memo on treasure trove and finders. What a statute can do is make precise how a finder's rights might be perfected in the face of a possible adverse claim by the original owner of the goods (e.g., by bringing it to the police and waiting for a year). The story of the $10,000 cash box was designed to point out how people, at least with the advice of counsel, are likely to proceed along those lines even in the absence of statute.

One of you came up with the rather interesting idea that Verner should be regarded as the "finder" because no one before Verner knew what the stone really was. As suggested below, that consideration may play a role in a possible private settlement of the suit, but, by and large, that's not the way that Anglo-American (or Continental) property law works. We try to get the title into someone as fast as possible and let the market work out the varying values that people might place on the object.>

The question then becomes whether any of this changes when we add the fact that O quite probably did not have the right to cut down the tree. One is reminded that "no one should profit from his own wrong." From what we can tell, however, O's cutting down the tree was as innocent as his possession of the land under it. Nobody had thought about A's will for a long time, and there is no indication that the right to the trees was in anybody's mind. If no one should profit from his own wrong, we have to be sure that what the alleged wrongdoer did was indeed a wrong, and one of which s/he was aware. What Olaf did seems to be a pretty technical wrong, if a wrong at all, and it seems pretty clear that he was unaware that he was committing a wrong.

An Owner of the Stone When It Was Found?

We return to the assumption that the runestone did, indeed, have no owner when O found it. In short, we have been assuming that the answer to SP's first question is that at the time of its discovery, the runestone was *res nullius*; it belonged to no one. Although he has not yet put in a claim to it, U is in a position where he might claim as the heir of S. (S died without descendants; U is the descendant of S's brother. None of this is easy to prove, nor is it that S is the person who carved the stone, but we're dealing with a potential civil action where facts are proven on the basis of what is more likely than not.) It is, however, possible to exclude U's claim along the following lines: Even assuming that S composed the poem and carved the stone, even assuming that that makes S the owner of the stone in the 12th century, and even assuming that the statute of limitations has not run out on any claim of his descendants, the fact is that all the indications are that S carved the stone in the hope that just what happened would happen. One carves a stone and leaves it in a place not because one wants to come back and claim ownership of the stone, one sets it up in the hopes that others will find it and read it.

<Others of you got to the same conclusion by other routes. A court might well be skeptical of any claim that depended on a 12th-century poem containing historical fact or that it was more likely than not that Snorri wrote it and carved the stone. That Snorri died without descendants is by no means certain. He could, as one of you suggested, have changed his mind about suicide and married a Chippewa maiden.>

The possible origins of the stone, however, do raise issues that are also raised by recent concerns about antiquities. Private ownership of the stone is not what S would have wanted if that private ownership would lead to the stone once more disappearing from view. Norway recognizes this in its antiquities statute which makes antiquities publicly owned. Iceland may, as well, though we are not told what Iceland's antiquities statute says. The fact, however, is that the stone was left in and discovered in Minnekota, and Minnekota's antiquities statute does not claim public ownership of antiquities found in the state. Unless the US is signatory to a treaty that obliges us to follow other states' antiquities statutes <it is not, so far as discoveries like this are concerned>, Minnekota law should apply to determining the ownership of the stone at the moment it was discovered.

<A couple of you brought Norway or Iceland into the picture by assuming that the stone had been carved there and somehow brought to Minnekota. I think this assumption is precluded by the facts stated. How could Snorri have known that his wife was going to die in Minnekota until he got there? Totally apart from this, does it make any sense to assume that 21 Vikings were lugging around a 200 lb. stone in their open boats?>

The Statute of Limitations on Personal Property

But if O was the owner of the stone when it was discovered, that does not make him the owner of it now. The most difficult issue in this case is the whether the statute of limitations has run on O's claim to ownership. The statute of limitations on actions to recover personal property in Minnekota (the law of which we are assuming applies) is six years. The stone went missing in 1999, and it is now eight or nine years later. There is no Minnekota authority on this topic (other than the statute of limitations itself), and the US authority on the topic is all over the lot.

Minnekota is one of those jurisdictions that attempts to downplay the common-law distinction between real and personal property. If we apply the principles that are used in the case of adverse possession of real property, we see that the most substantial problem that Verner will have defending on the basis of the statute of limitations is the open and notorious requirement. Someone other than Olaf possessed the statute from 1999 to the present. An unknown "American" sold

it to a Paris antiquities dealer sometime before the date in 2000 when V bought it. It has been in V's possession ever since. Totally apart from whether tacking will be allowed in the case of personal property, it is clear that the requirements of actual, exclusive, claim of right, and hostility have been met by Verner for the statutory period. What we don't know, and it is important for the open and notorious requirement, is when Verner started to publicize his purchase. It did not appear on television in Minnekota until 2005, which is not enough for the six-year statute, but it would be hard to hold that something is not open and notorious unless it appears on Minnekota television. The scholars in the Scandinavian department at Minnekota U. knew all about it when O showed up in 2005. It seems clear that anybody who was interested in runestones could have found out about this one sometime before 2005, but we don't know how far before.

Verner will probably argue that the whereabouts of the stone became open and notorious in 2000, when the Paris antiquities dealer advertised it in his catalogues. But the description in the catalogues was vague. Knowing about a runestone that seemingly everyone who is interested in runestones knows about is one thing; knowing what's in an obscure dealer's catalogues is another.

Let us assume that the existence of the runestone became known, at least to specialists in runestones, more than six years ago. Does O have any other arguments?

The most obvious argument is that the runestone was stolen. There seems to little doubt of this, though the identity of the thief, though suspected, is not known. Here, an analogy to real property cannot help us, because real property cannot be stolen.

American authority in cases involving stolen works of art seems relevant here, and although the authorities vary widely on the rules that they propose, they do seem to agree that it is possible to run out the statute of limitations on goods that are stolen. Since we are not bound by any local authority on the question, however, it would be open to a Minnekota court to hold that this is not the rule in Minnekota. Certainly, one can see the policy reasons that might support a holding that the thief could never run out the statute of limitations. While there is less reason for holding that a good-faith purchaser could not do so, one might make an exception in the case of antiquities. While it would be hard to impose on purchasers an obligation to determine that the title of the seller of most kinds of personal property was good, there is less reason to resist imposing such an obligation in the case of items where there is reason to suspect that the seller's title is illegitimate. (The same rule might also apply to works of art, at least those of some value.) If this case comes to litigation in our courts we might suggest that this could be the rule in Minnekota before proceeding to the arguments that the court is more likely to accept.

<There is no reason why you should have known what's in this paragraph.> The fact that Continental European law may be relevant to this case adds to the argument made in the preceding paragraph. Following Roman law, the Continental jurisdictions generally take the position that one cannot acquire title to goods that are stolen simply by possessing them for a long time.

The American jurisdictions have not gone that far, but they do show considerable hostility to dealing in stolen goods, even where it is done in good faith. American courts have not adopted the English concept of market overt. A good-faith purchaser can acquire title to stolen goods only from a merchant to whom the owner has entrusted the goods, which was clearly not the case here. When the statute of limitations begins to run against the owner in the case of a sale to a good-faith purchaser is a matter of some controversy. New York does not begin to run the statute until the owner has demanded the return of the goods and that demand has been refused. In this case, the demand was not made until 2007, and

we can at least argue that it has not yet been refused. This rule may, however, be dependent on the peculiarities of the common-law action of replevin, which we are specifically told Minnekota does not follow.

Other courts hold that the statute does not begin to run until the owner discovers, or with reasonable efforts could have discovered, where the goods are. O did not discover where the goods were until 2005, and the six-year statute has not yet run on that discovery. Whether he could have discovered it before that depends on whether we hold him to have known what was generally known among those who are interested in runestones. That was sometimes before 2005, but we don't know when (see discussion under "open and notorious.")

While New York does not begin to run the statute until demand and refusal, it does recognize that the good-faith purchaser may raise a defense of laches against the owner. How this works is not completely clear; the authority is quite recent. It would seem, however, that the same issues about what the owner could reasonably have discovered that arise in the discovery jurisdictions may get litigated in New York under the rubric of laches.

Hence, it would seem that whatever the court decides about the commencement of the running of the statute, we will be faced with arguing about whether O made enough of an effort to discover where "his" runestone was. Here, the situation for our client may get a bit dicey. So far as we can tell, O did nothing between the time that the stone was stolen in 1999 and when he chanced to see the television show in 2005. Now, of course, it is true that he did not know how valuable the stone was, but he had a picture of it (from which the specialists at the university were eventually able to identify the stone as the one that Verner has). The antiquities market is perhaps even more undercover than that in art of questionable origins, but a 200 lb. stone is not the sort of thing that one can just conceal in a suitcase, and the number of specialists in this type of object is small. Publicizing the theft of the stone would not have been impossible, and unlike the Gardiner Museum's missing Vermeer, there are far fewer shadowy collectors who would be interested in having something like this. <A number of you added to this argument by commenting on O's passivity when he found that the stone was missing. Quick action on his part (notifying the police, leading, perhaps, to their getting a search warrant for Thorkild's premises) might have prevented the stone's leaving the area and ending up in Paris.>

On the other side of the argument is the fact that the Parisian dealer in antiquities is "not particularly respectable," and his failure to record the name of the person from whom he had bought the stone suggests that he suspected that his seller was not totally on the up-and-up. At a minimum, Verner was willing to pay a lot of money for an object the title to which was uncertain, and he may have known more about its shady origins than he is letting on. That fact may lead us to argue that Verner is not a good-faith purchaser. Even if we establish that, however, it is still not clear that he cannot run out the statute at least under American law. Cutting in his favor, too, is the fact that he publicized his findings shortly after he acquired the stone.

It would seem that our best argument is to urge the court to adopt the New York rule about demand, and to attempt to defeat any laches argument by arguing that the amount of time that has passed is not that great (contrast the 20 years in the *Lubell* case) and that Verner has little to show in the way of detrimental reliance. <Some of you argued that he could. He's put a lot of effort into transcribing and publicizing his find. There may be something to that.> Failing that, we must argue that it is not unreasonable for a Minnekota farmer, even one of Norwegian descent, to assume that there was not much that he could do about his loss.

We also have to face that fact that any action that we bring to recover the stone will have to be tried in a Norwegian court. While Norway does not have as much of a claim to the stone as one of its antiquities (the only jurisdiction other than Minnekota that might have such a claim is Iceland), we must face the fact that a Norwegian court will be sympathetic to one of its citizens who purchased and brought to light an inscription that is of considerable interest for Scandinavian history and literature. If Verner can establish title to the stone, Norway might well act to ensure that it does not leave Norway, at least that it not leave Norway to fall into private hands. Indeed, Verner might well raise the ante on the litigation by offering to sell the stone to the Norwegian National Museum or to a consortium of the Norwegian National Museum and the Icelandic.

Our client is not interested in the stone; he's interested in what he can make out of it. He's got a claim, but the claim is certainly not open and shut. The stone ought to be in a museum; at least we can imagine a judge (whether Norwegian or American) thinking so. It would be of considerable interest in Norway (Hildebrand's home), Iceland (Snorri's home), and Minnekota (where Snorri and the maiden seem to have ended up). Trading it among these museums would certainly be possible. We don't know if Verner is willing to part with it, but he might be. Is there a possible win-win situation here with Verner and Olaf both getting compensation and the museums ending up with stone?

<A couple of you thought that ownership of the stone in the Johansons was possible. If it is (which I rather doubt), application of the discovery rule becomes quite dicey. They can hardly be held to pursue the theft of something that they didn't even know that they owned. Indeed, that's one of the reasons why I'm inclined to think that a court would not hold that they owned the stone, even if they are found to have a colorable claim to the land.>

Proposed Amendments to Minnekota's Antiquities Law

The proposal is to amend the state antiquities statute to eliminate the distinction between state lands and private lands insofar as the statute is concerned. We are not given much detail, presumably because the bill has not yet been drafted. We are told that no one is proposing that the prohibition on the sale of state lands that contain archeological sites or artifacts also apply to private lands (§ 13-6-304). Applying that provision to private land would almost certainly raise constitutional issues under *Hodel v. Irving*, but we need not deal with those here.

Presumably, the two most important pieces of the statute that are intended to be applied to privately-owned lands are those outlined in § 13-6-301 (a), where the state (1) reserves to itself the right and privilege of field archaeology (later defined), and (2) declares that "all information and objects deriving from state lands shall be utilized solely for scientific or public educational purposes and shall remain the property of the state." This latter clause is no masterpiece of draftsmanship, but apparently the "information and objects" are those of an archaeological nature. In the case of "objects" what is probably meant is what is later defined as "artifacts."

§ 13-6-303 of the statute requires that state agencies and local governments cooperate with the Minnekota Archeological Survey. They are urged (but not required) to notify the survey of any finds of sites or artifacts; they are required to cooperate with the survey to prevent destruction of sites and to allow the survey to remove artifacts. How much of this is to be applied to private lands is unclear, and the constitutional issues that it raises are somewhat different from those raised by the application to private lands of § 13-6-301 (a).

§§ 13-6-305, 13-6-306, and 13-6-307 impose criminal penalties on those who disturb archaeological sites, who remove artifacts, and who vandalize sites. § 13-6-305 applies only to sites that have been designated as such by the survey. Such designation cannot take place without the consent of the state agency that has jurisdiction over the land or of the private owner of the land. Hence, the provision already includes private lands, and presumably the private owner who has consented to the designation has also consented to the limitations of the section. § 13-6-306 applies to digging up or removing artifacts from private land without the permission of the owner. There is no equivalent provision with regard to state lands. Whether the legislature deemed the existing provisions on trespass to state lands adequate to restrain this kind of activity is hard to tell. It is also hard to tell just what effect equating state lands and private lands would have. It is hard to imagine that the legislature would remove the prohibition that already exists on digging up or removing artifacts. It might remove the implication in the current statute that a private owner could give permission for such activity to take place. This possibility, in turn, raises a somewhat different set of constitutional and policy issues. § 13-6-307 applies to state lands and private lands indifferently and would presumably remain unchanged.

Let us take the issues in order:

If applied to private land, § 13-6-301(a)(1) would give the state a monopoly on field archaeology. The only land that would be exempted would be those lands owned by the federal government (which may be substantial). It is hard to see how serious constitutional objections could be raised to such a statute on its face. It is possible that there is some land that is valuable only for field archaeology or that was bought specifically for that purpose, which might raise constitutional issues on an "as applied" basis. That it is rational, however, for a legislature to determine that amateur archaeology does more harm than good seems pretty clear. As a policy matter, one might well ask that a system be put into place whereby the state could, in fact, license archaeologists more competent than the ones that the state has got, but a blanket prohibition on field archaeology by anyone other than the state seems to be within the state's competence. Nothing, of course, in this provision of the statute requires that a property owner consent to having such archaeology take place on his property. It's just that he can't do it or authorize someone else to do it.

If applied to private land § 13-6-301(a)(2) raises more problems. The state here is declaring that the information and artifacts derived from field archaeology, perhaps that all antiquities, belong to it. The declaration that the information derived from archaeology (whether on state or private land) belongs to the state raises interesting questions with regard to intellectual property. The information itself is not federally patentable nor is it, as information, copyrightable. Whether the state can turn what is not property into property is an open question. From a policy point of view, it seems unwise. Science and public education, which are clearly the goals of the statute, are generally not encouraged by creating monopolies in information, even if they are in the state.

Claiming property in the artifacts raises somewhat different questions. If it were clear that antiquities found on private property belong to the landowner, then there would be a serious issue as to whether extending this provision to private land did not constitute a "taking." The taking here is more than merely regulatory. The state is declaring that it, and not the landowner, has title in the artifacts. As we have seen, however, it is by no means clear that the landowner has title to the antiquities that are on his land. We also argued above that the state did not have title to them. They were, we argued, *res nullius*, like the fox in *Pierson v. Post*. Could the state change that? *Hughes v. Oklahoma* suggests that as a matter of federal constitutional law the state does not have title to wild animals, but the Court has not passed on the question of the federal constitutionality of a state statute that went the other way, and at

least one state, Pennsylvania, has declared it owns the fish that begin in state hatcheries. A number of states vest title to certain kinds of found property in the state or one of its subordinate agencies. Depriving the landowner or the finder of an occasional arrowhead or runestone does not seem to be such a major change in the "background law" or a deprivation of "investment backed expectations" as to lead to the notion that it must be declared unconstitutional.

This is not to say that our clients are without an argument. They can certainly argue in a legislative setting that declaring that the state is the owner of something that it had never before claimed is unconstitutional, a taking of private property without compensation. They just have to careful about the follow-up question: "Who must we compensate?" From a policy point of view, moreover, the naked assertion of title may not be wise. While it may be, as was argued successfully on behalf of the government in *Andrus v. Allard*, that the only way to stop the illegal market in stolen antiquities is to prevent their sale in the first place, removing antiquities entirely from private ownership may be going "too far." There are probably tens of thousands of arrowheads buried someplace in Minnekota. Does the state really need them all? A regulatory scheme that allowed the archaeologists to uncover the site in a scientifically acceptable fashion and to photograph all that is found there, ultimately turning over all the less unusual artifacts to the landowner might actually encourage landowners to authorize excavations on their land.

<Others argued, I think with some force, that state ownership of antiquities would just drive more of them onto the black market.>

As is already intimated, § 13-6-303 poses the most serious problems when applied to private land, as does § 13-6-306 if it is amended to remove the implied privilege that it gives the landowner to deny permission to conduct archaeological work on his land. Any statute that is taken to authorize the state to enter land without the owner's permission is likely to run afoul of the takings clause and the peculiar talismanic value that the Supreme Court attaches to the right to exclude. One can, however, certainly imagine a statute being held constitutional that required as a condition of giving building permission in an area that was believed to contain archaeological remains that a reasonable amount of time be allowed to the archaeologists to determine what can be recovered from the site before it is destroyed by the construction. But the landowner who says "I'm just going to leave that site in its natural state, and I don't want you coming on my land and digging it up" probably has a constitutional right to say so. It is this fact that leads to the suggestion that the landowner needs to get something out of it in return for his permission, and the promise that he will be able to sell or keep some, if not all, of the artifacts found there may be a good compromise.

The current Minnekota statute (like the federal statutes concerning archaeological sites and burial grounds of native peoples) carefully distinguishes between government-owned land and privately owned land. In a farming state, where land is key to the welfare of the population, people like our clients have a strong attachment to their land. The legislature should be cautious in invading what many will regard as private property rights. The political repercussions could be serious. This may be a better argument than the constitutional ones.

<A number of you, particularly those of you who read the proposed amendments more broadly than I think is necessary, said that the there would be potential procedural due process objections to such an amendment. I'm inclined to think that judicial review of the determinations of the Archaeological Survey would be assumed, but the power that that agency has with regard to state land and objects on it might well be subject to more explicit review provisions when applied to private land. Hence, I'm inclined to think that the point is well-

taken. It's one of those things that sits uneasily on the border line between possible constitutional objections and possible policy objections.

A number of you also did a much better job than I did on the more political or policy arguments against such a statute. One can be even more skeptical than I was about the wisdom of giving the state a monopoly on archaeology. Most of the world's great archaeological finds have been made private individuals or institutions, and bureaucratizing archaeology in a era of limited state budgets may simply lead to it not being done. One of you also made a quite passionate argument about how adding an additional layer of regulation to small farms might be the straw that breaks the camel's back, further depopulating states like Minnekota.>